NO. 87-1810

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALVIN WARREN and ALFRED WARREN,

Petitioners,

v.

HALSTEAD INDUSTRIES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER A GROSS STATISTICAL DISPARITY CAN EVER BE SUFFICIENT TO PROVE PRETEXT IN AN INDIVIDUAL EMPLOYMENT DISCRIMINATION ACTION UNDER TITLE VII OF THE 1964 CIVIL RIGHTS ACT AND 42 USC SECTION 1981 IN ORDER TO REBUT THE EMPLOYER'S ARTICULATED REASON FOR ITS EMPLOYMENT DECISION?

2. WHETHER THE BURDEN OF PERSUASION SHIFTS TO THE EMPLOYER TO PROVE THAT IT WOULD HAVE MADE THE SAME ADVERSE EMPLOYMENT DECISION EVEN WITHOUT CONSIDERATION OF THE PROHIBITIVE FACTOR WHEN THE PLAINTIFF HAS ESTABLISHED A PRIMA FACIE SHOWING OF RETALIATORY DISCHARGE UNDER TITLE VII OF THE 1964 CIVIL RIGHTS ACT?

3. WHETHER THE COURT OF APPEALS' STANDARD OF APPELLATE REVIEW FOR THE FACTFINDING PROCESS EMPLOYED BY THE DISTRICT COURT WHICH HAD CREDITED TESTIMONY THAT WAS DIRECTLY CONTRADICTED BY DOCUMENTARY EVIDENCE IS CONTRARY TO RULE 52(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THIS COURT'S DECISION IN UNITED STATES V. UNITED STATES GYPSUM COMPANY?

PARTIES IN THE COURT BELOW

All parties in this matter are set forth in the caption.

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No. 87 - _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

ALVIN WARREN and ALFRED WARREN,

Petitioners,

vs.

HALSTEAD INDUSTRIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

The petitioners, Alvin Warren and Alfred Warren, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 7, 1988.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 802 F. 2d 746 and is set out in the appendix to this petition at pages 1a- 69a. The opinion of the court of appeals sitting en banc is reported at 835 F. 2d 535 and is set out in the appendix to this petition at pages 70a-73a. The opinion and judgment of the district court dismissing the case is reported at 613 F. Supp. 499 and is set out in the appendix at pages 74a-120a.

JURISDICTION

The judgment of the court of appeals sitting en banc which affirmed the district court's dismissal of the case was entered on January 4, 1988. On March 24, 1988, Chief Justice Rehnquist entered an order extending the time for filing a petition for writ of certiorari to and including May

3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

This case involves the following statues: 42 U.S.C. Section 2000e-2
42 U.S.C. Section 2000e-3
42 U.S.C. Section 1981

The pertinent sections of these statutes are set forth in the appendix at 121a-122a.

STATEMENT OF THE CASE

1. Proceedings Below

The petitioners, Alfred and Alvin Warren, brought this action on February 1, 1982, in the United States District Court in the Middle District of North Carolina against their former employer, Halstead Industries, Inc. The action was brought under 42 U.S.C. Sections 2000e-2, 2000e-3, and 1981, and alleged that the petitioners were discriminated against with respect to

promotions and discharge on account of their race, and in addition alleged that they were victims of retaliatory discharge as a result of complaining to their employer about promotion discrimination and filing EEOC charges.

The case was tried before the trial judge without a jury the week of June 5, 1984. The trial court ruled for the respondent on all issues, and dismissed the case. Petitioners appealed to the United States Court of Appeals for the Fourth Circuit. The court of appeals affirmed in part and reversed in part. The court ruled that both plaintiffs had proved promotion discrimination based on race, and that Alvin Warren had proven both retaliatory discharge, and discharge based on race. The Court also ruled that Alfred Warren was not a victim of retaliatory discharge by

Halstead Industries. After a timely petition for rehearing was granted, the Court of Appeals sitting en banc reversed its previous decision, and affirmed the district court in all respects.

2. Statement of Facts

At trial, the petitioners introduced substantial evidence of racial discrimination in promotions and retaliatory discharge by Halstead. Petitioners received good evaluations and had rather pleasant work experiences until they complained of racial discrimination in promotions at Halstead. When a group of black employees including petitioners went to the personnel manager, Clyde Allen, in October, 1978 to protest racially discriminatory promotions, they were told to "get the hell out". Warren v. Halstead, 802 F 2d 746, 757 at Footnote 9. Immediately

after this meeting, the Warrens and the other black employees who had complained about discrimination were subjected to retaliation in the form of white supervisors standing in front of their machines to hinder them from getting out production, hollering in their faces, and rubbing their buttocks with their hands or sexual organs. Because this conduct continued, two different groups of black employees went to see the plant manager, John Terlinden, to complain of the discriminatory treatment on December 19 and 20, 1978 respectively. Although the employees arrived before their shifts, they were made to wait until after the start of their shifts without ever seeing Terlinden. 802 F 2d at 757, Footnotes 9-11. Alvin Warren received a write up on December 20, 1978 after the attempted meeting with Terlinden

for "Lack of cooperation with foreman, did not start shift on time." Afterwards he was placed under constant surveillance. Notes were made by the same white supervisors who were harasssing him, and were surrepticiously placed in his personnel file. No notes were kept on any white employees except Perry Kendrick, who was the only white employee who went with the black employees to see Terlinden in December. On January 15, 1979, Alvin Warren filed a charge of discrimination with the EEOC against Halstead. On February 2, 1979, he was terminated for "Lack of Cooperation." 802 F 2d at 757-758, Footnotes 12-16.

After Alfred Warren attempted to meet with Terlinden in December, 1978, he received write-ups and suspensions for absences. Although he was absent for 24

days during his employ, all were due to job related injury or illness. Halstead's stated policy was that no absence due to job-related injury or illness would be counted against an employee. He was charged with 10 days of absence when he was receiving Worker's Compensation benefits. His medical excuses were rejected without ever telling him. 802 F. 2d at 754-755, Footnotes 4-6. On January 15, 1979, Alfred Warren filed a charge with the EEOC. On January 22, 1979, he was terminated for excessive absenteeism. Halstead had a strict policy of departmental seniority. Halstead's records show that on December 18, 1978, a less senior white employee, Stephen Boles was promoted to a temporary leadman over petitioners and remained in that job until he became a leadman on March 23, 1979.

REASONS FOR GRANTING THE WRIT

This case presents important issues relating to the enforcement of the civil rights statutes concerning which the circuits are in conflict. The effect of a gross statistical disparity on the issue of pretext in order to rebut the employer's articulated reason for its employment decision is an important and recurring issue in employment discrimination litigation.

Whether the burden of persuasion shifts to the employer in a mixed motive case and if so, what the standard of proof is for the employer, is a recurring issue upon which the circuits have reached widely divergent conclusions. Because of the uncertainty in this fundamental area among the circuits, certiorari is warranted. Lastly, this case raises, the issue of the

factfinding process under Rule 52(a), when testimony is directly contradicted by contemporaneous documentary evidence.

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER EVIDENCE OF A GROSS STATISTICAL DISPARITY CAN EVER BE SUFFICIENT TO PROVE PRETEXT IN AN INDIVIDUAL EMPLOYMENT DISCRIMINATION ACTION UNDER TITLE VII OF THE 1964 CIVIL RIGHTS ACT AND 42 USC SECTION 1981 IN ORDER TO REBUT THE EMPLOYER'S ARTICULATED REASON FOR ITS EMPLOYMENT DECISION.

The District Court here held that: "Statistics are not sufficient to prove pretext in individual disparate treatment cases." (See Footnote 2) The Fourth Circuit initially rejected this legal proposition as erroneous. In Warren v. Halstead Industries, Inc., 802 F. 2d 746 (4th Cir. 1986), the Fourth Circuit held that the statistical evidence was sufficient to prove pretext:

Finally, there is the statistical

> evidence presented by the plaintiff's expert witness showing that the number of blacks discharged from Halstead in 1978 and 1979 was at a deviation rate higher than would be explained by chance, and, in fact, was in a range where an inference of discrimination is raised. Id. at 758-759.

The court pointed out that the number of standard deviations with respect to a comparison of the discharge rates of black and white employees at Halstead in 1978 was 9.08 and in 1979 was 8.18, where a standard deviation greater than two or three necessarily excludes "chance" as the cause of under representation. (See Footnote 18) Subsequently, the Fourth Circuit sitting en banc reversed its previous decision and adopted by implication the District Court's previous ruling that statistics could never prove pretext in an individual disparate treatment case.

The decision of the Fourth Circuit is

contrary to the opinions of other circuit courts. The Ninth Circuit has ruled that statistical evidence can prove that the defendant's articulated nondiscriminatory reason for the employment decision in question is pretextual. In Diaz v. American Telephone & Telegraph, 752 F. 2d 1356 (9th Cir. 1985), the Ninth Circuit held at p. 1363:

> Statistical data is relevant because it can be used to establish a general discriminatory pattern in an employer's hiring or promotion practice. Such a discriminatory pattern is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue.

The court in Diaz, supra. noted at Footnote 8 that the same statistical evidence that a plaintiff introduces to establish a prima facie case may be considered by the trier of fact on the issue of whether the defendant's explana-

tion for the employment decision is pretextual. In United States v. Ironworkers Local 86, 443 F. 2d 544, 551 (9th Cir.), cert. denied, 404 U.S. 984, 92 S. Ct. 447, 30 L. Ed. 2d 367 (1971), the Ninth Circuit emphasized that: "In many cases the only available avenue of proof is use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved." See also Lynn v. Regents of the University of California, 656 F. 2d 1337 (9th Cir. 1981).

Likewise, the Seventh and Eighth Circuits have held that statistics may prove intentional discrimination against an individual plaintiff. Riordan v. Kempiners, 831 F. 2d 690 (7th Cir. 1987); Powers v. Dole, 782 F. 2d 689 (7th Cir. 1986); Craik v. Minnesota State University Board, 731 F. 2d 465 (8th Cir. 1984), the Eighth

Circuit underscored that statistical evidence is relevant to individual claims because it "is often a telltale sign of purposeful discrimination."

The Third Circuit in Blum v. Witco in an age discrimination case emphasized that plaintiffs' expert "produced convincing statistical evidence that the chance that the plaintiffs were terminated for non-age related reasons was almost nonexistent." The Third Circuit concluded that evidence of a statistical disparity was an appropriate method of proving discrimination in an individual case. Blum, supra. at 372.

Because every litigant in a disparate treatment employment discrimination case is confronted with the question of what amount of proof will show pretext, and because statistical proof is frequently used for

that purpose, the conflict among the circuits with respect to this issue needs to be resolved. This issue is both recurring and important in employment discrimination litigation.

II.

THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THIS COURT, INCLUDING McDONNELL DOUGLAS CORP. v. GREEN AND TEAMSTERS v. UNITED STATES.

Although this Court has never expressly decided the issue presented in this case - i.e. whether evidence of a gross statistical disparity in an individual disparate treatment case under Title VII can prove pretext, this Court has consistently noted the importance of statistical proof in proving racial discrimination. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), the Court specifically pointed out that on the issue of pretext in an employ-

ment discrimination action statistics may be helpful to show whether the employer's action conformed to a general pattern of discrimination against blacks. Id. at 805. In noting that " statistics are equally competent in proving employment discrimination," this Court stated in Teamsters v. United States, 431 U.S. 324, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977) in pertinent part:

> Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though Section 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population.
>
> Since the passage of the Civil Rights Acts of 1964, the courts have frequently relied upon statistical evidence to prove a violation. In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved. Id. at 340, Footnote 20.

This Court has determined when a statistical showing will be so gross or extreme that discrimination is the only logical cause for the disparity. In Arlington Heights v. Metro. Housing Corp., 429 U.S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977), the Court emphasized that sometimes a clear pattern, unexplainable on grounds other than race emerges, and that when this occurs the inquiry is relatively easy. It noted that such cases are rare. However, that rare case is presented here, where the statistical disparity is so gross that all chance has been ruled out. In Castaneda v. Partida, 430 U.S. 482, 51 L. Ed. 2d. 498, 97 S. Ct. 1272 (1977), this Court stated that "if a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to

the contrary, one must conclude that racial or other class-related factors entered into the selection process. Id. at 494, Footnote 13. Moreover, this Court further explained in Hazelwood School District v. United States, 433 U.S. 299, 53 L. Ed 2d. 768, 97 S. Ct. 2736 (1977) that when the number of standard deviations are greater than two or three, the hypothesis that decisions are being made randomly with respect to race would be completely undercut. Id. at 311.

The decision of the Fourth Circuit sitting en banc in adopting the District Court's legal conclusion that a gross statistical disparity could never prove pretext in an individual disparate treatment case is inconsistent with the body of law concerning statistical proof which has been developed by this Court over time.

Because the number of standard deviations in the instant case is so gross and extreme, this case presents a very clear issue to this Court as to the legal effect of such a gross statistical disparity in proving that the employer's articulated reason for its adverse employment decision was a pretext for discrimination.

III.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER THE BURDEN OF PERSUASION SHIFTS TO THE EMPLOYER TO PROVE THAT IT WOULD HAVE MADE THE SAME ADVERSE EMPLOYMENT DECISION EVEN WITHOUT CONSIDERATION OF THE PROHIBITIVE FACTOR WHEN THE PLAINTIFF HAS ESTABLISHED A PRIMA FACIE SHOWING OF RETALIATORY DISCHARGE UNDER TITLE VII OF THE 1964 CIVIL RIGHTS ACT.

This Court has not expressly addressed the mixed-motive problem in a Title VII case. There is a wide and stark conflict between the circuit courts on this issue. In the instant case, the District Court found that the plaintiffs had made out a

prima facie case of retaliatory discharge, but had failed to carry their burden of persuasion by showing that they would not have been terminated "but for" the filing of EEOC charges. In Warren, supra. at p. 755, the Fourth Circuit stated that even if discriminatory animus or retaliation is in part a reason for the adverse employer actions, it has adopted a more stringent standard which requires the plaintiff to show that he would not have been discharged "but for" the filing of the charge on the protected activity. Ross v. Communications Satellite Corp., 759 F. 2d 355 (4th Cir. 1985). Under the "but for" test, the burden of persuasion always stays with the plaintiff regardless of a prima facie showing of retaliatory discharge. In the instant case, the District Court concluded that the employer's burden was merely one

of production after the plaintiffs had made out a prima facie case - i.e. that the employer merely had to articulate a reason for discharging the plaintiffs.

In Village of Arlington Heights, supra. at 265-266, this Court stated unequivocally that when the evidence establishes that a decision was motivated in part by a racially discriminatory purpose, the burden of persuasion shifts to the defendant to prove that the same decision would have resulted even had the impermissible purpose not been established. Although this Court's decision in Village of Arlington Heights focused on whether there was a violation of the Equal Protection Clause, some circuit courts have applied the "shifting burden of persuasion" approach to Title VII cases based on the decision in Village of Arlington Heights.

The Eight and Ninth Circuits have rejected the "but for" test, and have sought to employ the approach used by this Court in Village v. Arlington Heights. In Bibbs v. Block, 778 F. 2d 1318 (8th Cir. 1985), the Eighth Circuit held that once a plaintiff in a mixed motive case has established a violation of Title VII by proving that an unlawful motive played some part in the employment decision or decisional process, the plaintiff is entitled to some relief, including, as appropriate, a declaratory judgment, partial attorney's fees, and injunctive relief against future or continued discrimination. The Eighth Circuit held at p. 1324:

> However, even after a finding of unlawful discrimination is made, the defendant is allowed a further defense in order to limit the relief. The defendant may avoid an award of reinstatement or promotion and back pay if it can prove by a preponderance of the evidence that the plaintiff

> would not have been hired or promoted even in the absence of the proven discrimination. The same-decision test will apply only to determine the appropriate remedy and only after plaintiff proves he or she was a victim of unlawful discrimination in some respect. For that reason, the burden of production and persuasion shifts from the plaintiff to the defendant.

Although pointing out that the Ninth Circuit requires an employer to prove that it would have made the same decision by clear and convincing evidence, the Court in Bibbs stated that the Eighth Circuit had decided to employ a preponderance of the evidence standard. The Ninth Circuit has also adopted the "shifting burden of persuasion" approach to a mixed-motive case under Title VII. In League of United Latin American Citizens v. City of Salinas Fire Department, 654 F. 2d 557 (9th Cir. 1981), the Ninth Circuit held that once intentional discrimination in a particular

employment decision is shown, the employer must prove by 'clear and convincing' evidence that even in the absence of discrimination the rejected applicant would not have been selected for the open position. The underlying rationale was clearly expressed by the Court at p. 559:

> The burden of showing that proven discrimination did not cause a plaintiff's rejection is properly placed on the defendant-employer because its unlawful acts have made it difficult to determine what would have transpired if all parties had acted properly.

In addition, the Seventh Circuit has also adopted the same approach. Cavidale v. State of Wisconsin, Dept. of Health & Social Services, 744 F. 2d 1289 (7th Cir. 1984). The Seventh Circuit held that this allocation is consistent with the principle placing upon a party the burden of proving facts peculiarly within its knowledge, and with the principles announc-

ed in Teamsters, supra. at 357-62.

Finally the D.C. Circuit has also applied this burden-shifting approach in mixed motive cases under Title VII. See Day v. Matthews, 530 F. 2d 1083 (D.C. Cir. 1978). In Toney v. Block, 705 F. 2d. 1364 (D.C. Cir. 1983), Judge Tamm in his concurring opinion stated at p. 1372:

> The Supreme Court has not expressly decided the issue, and other federal courts have wavered among 'but for,' 'substantial factor,' and 'a' factor causation. The best view is that proof of unlawful discrimination requires merely proof that discrimination was a factor in the employment decision.

Judge Tamm in his concurring opinion in Toney pointed out that shifting the burden of proof from the plaintiff to the employer is consistent with the Supreme Court's analysis of the causation issue in Village of Arlington Heights, supra. Id. at 1373, Footnote 5.

Commentators have noted the uncertainty in this area, and the wide divergence among the circuit courts. Brodin, "The Standard of Causation in Mixed-Motive Title VII Action: A Social Policy Perspective," 82 Columbia L. Rev. 292 (1982).

In summary, given both the conflict in the circuits and the recurrence and importance of the issue, certiorari should be granted to resolve it in the present case.

IV.

THE COURT OF APPEALS' STANDARD OF APPELLATE REVIEW FOR THE FACTFINDING PROCESS EMPLOYED BY THE DISTRICT COURT WHICH HAD CREDITED TESTIMONY THAT WAS DIRECTLY CONTRADICTED BY DOCUMENTARY EVIDENCE IS CONTRARY TO RULE 52(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THIS COURT'S DECISION IN UNITED STATES V. UNITED STATES GYPSUM COMPANY

In Anderson v. Bessemer City, 470 U.S. 564, 84 L. Ed. 2d. 518, 105 S. Ct. 1504 (1985), this Court addressed the proper role of appellate review of appel-

late courts in assessing the factfinding process of district courts. In noting that Rule 52(a) of the Federal Rules of Civil Procedure requires deference to the trial court's findings of fact, this Court stressed that:

> This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it.

In the present case, Halstead Industries had a strict departmental seniority policy. The plaintiffs were hired a month and a half prior to a white employee named Stephen Boles. On December 18, 1978, Boles was promoted over the plaintiffs to a temporary leadman position in the B-bay area of the production department. His

employment service record which was introduced into evidence by the plaintiffs clearly shows that he was a temporary leadman from December 18, 1978 to March 23, 1979 when he became a bench operator leadman. (Plaintiffs' Exhibit No. 3). Halstead kept a contemporaneous employment service record on every employee. In the instant case, the employment service record of Boles clearly demonstrated that the plaintiffs had been discriminated against in promotions. In an effort to rebut the plaintiffs case after the plaintiffs had introduced this documentary record into evidence, the defendant's personnel manager attempted to try to undercut the validity of the company's own records. Allen surmised that Boles was probably a temporary leadman for two weeks, and that the company's records were probably in error.

When cross-examined on his assertion, Allen admitted that he was not sure whether Boles was in the leadman position for two weeks or not. In spite of the speculative nature of Allen's testimony and the fact that it was directly contradicted by the company's own records, the District Court at Finding of Fact No. 8 found that Boles was not actually promoted to leadman but only filled in as a temporary substitute for his leadman and supervisor for a period of two weeks.

The Fourth Circuit initially reversed the District Court in Warren and stated at p. 760:

> The difficulty with the district court's acceptance of this version of events in its findings of fact as to Boles' temporary upgrade' is that Halstead's own records contradict it. It is true that the Halstead 'Personnel Polices and Procedure' manual allows temporary transfers (not to exceed one week) without regard to qualifications or seniority. But,

> Boles' 'temporary transfer' lasted for approximately thirteen weeks.

The Fourth Circuit panel found this factfinding process to be unacceptable under Rule 52(a), when it held at p. 761:

> It is not the appropriate role for a court to second-guess the evidence before it and rely on one party's contention that it 'could have' brought the evidence supporting its story to the factfinder. On their face, the company records corroborate plaintiffs' claim that a white employee with six-weeks less seniority was promoted over them. Plaintiffs have thus made out a prima facie case of discrimination in promotion and successfully rebutted Halstead's proffered non-discriminatory reason that plaintiffs had less seniority. We have no choice but to find the district court's Finding of Fact #8 and its conclusion of law based on that finding of fact to be clearly erroneous.

Subsequently, the Fourth Circuit sitting en banc reversed the original panel, and held that since the District Court made detailed and thorough findings of fact, the reviewing court under Rule

52(a) and Anderson, supra. was required to accord heightened deference to the District Court's findings of fact.

The District Court's factfinding process which was ultimately approved by the Fourth Circuit is contrary to this Court's decision in United States v. United States Gypsum Company, 333 U.S. 364, 92 L. Ed. 746, 68 S. Ct. 525 (1948). In United States Gypsum Company, supra., this Court was faced with virtually the same issue. In that case, the testimony of the company's witnesses was contradicted by its own contemporaneous documents. This Court held that the district court's factfinding process which had ignored the documentary evidence and credited the testimony to the contrary did not pass muster, and that findings of fact based thereon were clearly erroneous. This Court held at p. 396:

> Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the oppportunity of the trial court to appraise the credibility of witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous.

The issue presented here was not addressed nor decided in Anderson, supra. Although the Fourth Circuit interpreted Anderson as requiring almost virtual deference to the district court's findings of fact if they are detailed and thorough, this Court's decision in Gypsum indicated that when the testimony is contradicted by documentary records, it would be a most questionable factfinding process for the district court to ignore the documentary records. Because of the critical nature of the factfinding process and the role of appellate review, certiorari is necessary for this Court to reconcile Anderson,

Gypsum, and Rule 52(a).

CONCLUSION

For the foregoing reasons certiorari should be granted and the decision of the court below reversed.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1575

Alvin Warren and Alfred Warren,
Appellants,

versus

Halstead Industries, Inc.,
Appellee,

and Chauffeurs, Teamsters and Helpers Local Union No. 391, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America,
Defendants.

Appeal from the United States District Court for the Middle District of North Carolina at Winston-Salem.
Frank W. Bullock, Jr., District Judge.
(C-82-153-WS)

Argued December 2, 1985.
Decided October 2, 1986.

Before WINTER, Chief Judge, MURNAGHAN, Circuit Judge, and LUTHER M. SWYGERT, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

Harvey L. Kennedy and Harold L. Kennedy, III for Appellants; James B. Spears, Jr. and Thomas A. Bright for Appellee.

SWYGERT, Senior Circuit Judge.

This case concerns an action charging employment discrimination based on race in violation of Title VII and Section 1981. Plaintiffs allege that their discharge from employment was in retaliation for filing administrative charges of discrimination with the Equal Employment Opportunity Commission or for complaining to management of Halstead Industries, Inc., their employer, about racial discrimination in promotions. Upon our review of the record, we affirm in part and reverse in part and remand the case to the district court for further proceedings consistent with this opinion.

I

The facts in this case are heavily contested. The serious allegations made by the Plaintiffs are generally denied by the

defendants; the district court based much of its decision on credibility and discounted key testimony of both Plaintiffs. Our first task, therefore, is to review the voluminous record and to glean the facts from the conflicting versions. There is no dispute that on June 12, 1978 the Plaintiff-brothers, Alfred and Alvin Warren, were hired by Halstead Industries, Inc. ("Halstead") located in Pine Hall, North Carolina. The two black men sought employment following several years of college study. Both Plaintiffs and their family members were active in Stokes County, North Carolina politics.

The Halstead factory manufactured cooper tubing; it was a new plant, having been constructed in December 1977. During the first years of operation, the number of black employees was low (fourteen black

employees out of 95 in 1977; seventeen blacks out of 190 in 1978; 56 blacks out of 372 in 1979). The original supervisors were white employees who moved to Pine Hall from two other Halstead plants. It is contested whether any black foreman or supervisors were employed in the plant as a whole or in Halstead's production department ("the B-bay) from 1977 to 1979.[1]

As an additional factor, Halstead's Pine Hall plant was in flux because a union

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[1] Defendant's interrogatory responses indicate that no black leadmen were employed in the plant in 1978 or 1979. However, Personnel Manager, Clyde Allen testified that ten black men were promoted to leadmen in those years, including promotions within plaintiffs' own department. (Jt. App., Vol. V, pp. 168-69.) Plaintiffs assert that no blacks were promoted to leadmen in the production department during the relevant time period, (Vol. III, p. 13), and Plant Manager John Terlinden appears to corroborate that assertion. (Vol. V, pp. 118-20.)

membership drive for the International Brotherhood of Teamsters ("the Union") was being promoted throughout the time span with which this case is concerned, and there was a possibility of a strike. In June 1978 handbilling began; in September the Warrens joined the Union and participated in efforts to organize the Union at the Stokes County Plant (e. g., wearing Union T-shirts and hats to work, passing out cards, and handbilling). An election was held in December 1978, and the Union was elected to represent the employees. After the Plaintiffs were terminated from employment, August 1979 to April 1980, Halstead went through a protracted strike.

Few other facts are undisputed. Rather, the balance of the allegations are found in the two parties' conflicting

statements. The Plaintiffs allege a pattern of company actions constituting discrimination in promotion and racial harassment. The Warrens claim that ultimately they were discharged from employment when they, along with other employees, sought to meet with management and later filed charges with the Equal Employment Opportunity Commission ("the EEOC").

The Warrens claim that their probationary work records were good.[2] Both brothers were hired as utility laborers.

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[2] The Warrens point to employee evaluation reports completed for Alvin on June 26, July 17, and August 9, 1978 which indicated " at least average" marks for attendance and "very good" marks for work performance. The evaluation reports for Alfred, dated for the same period, ranked him as "average" in all categories, except for an "excellent" rating for attendance. (Vol. II, p. 94.)

Alfred was assigned to a bench helper's position during his probationary period; at the end of the time, he was designated a bench operator. At the time Alvin was hired he worked as an operator for about three weeks; he was removed from that job while still on probation. Jimmy Gann, a white employee, was then assigned to Alvin's position. It is undisputed that the brothers did not receive write-ups and faced no major personnel problems until the fall of 1978 when they allegedly were passed over in promotion in favor of two white employees with less seniority. Plaintiffs assert that in September 1978 a vacancy occurred for the position of leadman in their production department. Although Halstead's policy had been to grant a promotion based on departmental seniority, the Warrens contend that on September

11, 1978 white employee Greg Smothers was promoted to leadman with less seniority than Plaintiffs. Further, they assert that on October 11 Gann was also so promoted. (Later, on December 18 Stephen Boles was also allegedly promoted to leadman out of seniority sequence.) The company insists that these promotions were in accordance with seniority.

Seeking to raise a grievance following these first two promotion decisions, Plaintiffs and other black employees sought a meeting with Personnel Manager, Allen on October 12. Allen allegedly said to them: "Get the hell back to work or punch the damn clock." Allen denies talking with the Plaintiffs about problems regarding discrimination against blacks being promoted on this or any other date up to January 17, 1979. (Vol. VI, p. 133.) Following that

attempted meeting, Plaintiffs assert, a pattern of daily retaliation was put into effect by immediate foreman Larry Sands, the recently promoted Gann, and Smothers.

Specifically, these complained-of retaliatory acts consisted of "getting in the way of Plaintiffs being able to get out production." The acts reportedly included "hollering from twelve inches away" in the Plaintiffs' faces and rubbing Plaintiffs' buttocks with hands or sexual organs. The white supervisors allegedly stood between the Plaintiffs' machines and control panels to hinder their work production. Both Plaintiffs testified that they felt humiliated, like a "piece of meat." At the same time that these retaliatory acts were reportedly being committed, the white supervisors were admonishing the Plaintiffs to "cooperate." The Warrens contend that

Sands and Smothers did not engage in this type of behavior toward white employees.

Plaintiffs also claim that numerous racial comments were made to black employees. Alfred alleges, for instance, that at the time he received a three-day suspension, Personnel Manager Allen told him that "this country should be like it is in South Africa, that the white man should be ruler, that the black man didn't have enough intelligence to have a leadership position." Similarly, Alvin Warren contends that Allen told him that the "white man was always going to be superior to the black because of money." Allen acknowledges talking to Alvin about South Africa, but denies that it was in a discriminatory manner.

To counteract the harassment, Plaintiffs allege, they sought, along with

other black employees, to meet with Plant Manager Terlinden on December 19 and 20, 1978. Both groups working on two different shifts were allegedly made to wait for thirty minutes and then told to return to work without having made any arrangements to talk to Terlinden. It is undisputed that Alvin received a "first warning" because of "lack of cooperation" on December 20, 1978, and Alfred received a "first warning" on December 19, 1978 citing "walked off job without permission." (Vol. II, pp. 45, 53).

Following the attempted meeting with Terlinden, Plaintiffs testified the write-ups and disciplinary measures escalated; Alvin claims he no longer took breaks and recruited a fellow employee to bring lunch to his machine. It is undisputed that beginning on the date of the attempted

meeting with Terlinden Alvin's supervisors began keeping notes on cards documenting Plaintiff's "lack of cooperation." These cards were never shown to the Plaintiff, nor were the notes kept on any white employee in B-bay other than Perry Kendrick, who accompanied Plaintiffs and black employees when they sought to complain to Terlinden. Halstead characterizes the cards as a normal plant practice.

On January 15, 1979 both Plaintiffs filed charges of racial discrimination with the EEOC in Charlotte, North Carolina; six other black employees filed the same charges. The Plaintiffs further allege that after they filed the charges the retaliatory behavior increased. Alvin testified that while he was training Gary Calloway, a white employee came at him from behind and hit him on the head with a

cooper tube. Alvin contends that even though Bill McClain, an area supervisor, was standing nearby, McClain "just turned his head away." Halstead's "Accident Investigation Report" of January 4, 1979 signed by Sands lists the circumstances as "crane moved and employees let go of tube which hit injured in head." (Vol. II, p. 86.)

Alvin further alleges that the reason he was unable to begin work on time the morning of December 20 was that his toolbox had been demolished and he had to locate another. Every day thereafter, he alleges, his tools were hidden, and although he complained to Allen, no action was taken. The company characterized the tools as "lost."

On January 22, 1979 Alfred was terminated for excessive absenteeism. On

February 2, 1979 Alvin was terminated for failure to cooperate. Plaintiffs allege that all of the other black employees who filed EEOC charges were also thereafter terminated (specifically, Ronnie Anderson, James Eckerd, Steven Golden, Robert Martin, William Dalton, and Joe McClinton). They further allege that one of the four employees involved in the December attempted meeting--white employee Kendrick--was also fired.

On February 1, 1982 the Warrens filed a complaint in the United States District Court for the Middle District of North Carolina. First, they alleged that the Union had breached its duty of fair representation by not perfecting an appeal on the grievance dismissed by the National Labor Relations Board. Second, they claimed that Defendants had violated the Civil

Rights Act of 1866, 42 U.S.C. Section 1981 ("Section 1981") and Title VII of the Civil Rights Act of 1964 ("Title VII") in various respects.

On October 21, 1983 the district court granted in part and denied in part Defendant's motion for summary judgment. The court dismissed all claims by Alfred under Section 1981, the claim by Alvin under Section 1981 for racial harassment, and both Plaintiffs' Title VII claims for racial harassment, threats, and discharge from employment because of race. The court therefore limited the case to the following issues:

(1) Was plaintiff Alvin discharged because of his race in violation of section 1981;

(2) Was plaintiff Alvin discharged in retaliation for filing administrative charges of racial discrimination with the EEOC or for complaining to management about racial discrimination in violation of section 1981;

(3) Were both plaintiffs discharged in retaliation for filing administrative charges of racial discrimination with the EEOC or for complaining to management about racial discrimination in violation of Title VII; and

(4) Did the defendant fail to promote both plaintiffs to various leadmen positions because of race in violation of Title VII?

On April 26, 1985, after a five-day bench trial, the district judge entered judgment in favor of the Defendant and dismissed the cause with prejudice. Plaintiffs now appeal.

II

This case is made difficult and troubling because of the wide disparity in the factual stories that the two parties bring to the court. On one hand, the employee-plaintiffs raise allegations of actions by Halstead which amount to serious--indeed, outrageous--conduct, if true. On the other hand, Halstead flatly

denies virtually all that alleged conduct and admits only to the discharge of the Warren brothers, for which it offers a non-discriminatory rationale. This is not a typical case where a Defendant admits a challenged practice but disputes any inferences of discriminatory intent arising from it. See Sledge v. J.P. Stevens & Co., Inc., 585 F. 2d 625, 634 (4th Cir. 1978). Given this situation, in which the fact-finder must decide between two conflicting versions of the relevant events, it is inevitable that the decision of the district court rested upon its evaluation of credibility.

Further complicating this case is the fact that plaintiffs' claims under section 1981 and Title VII for racial harassment and threats were dismissed on defendant's motion for partial summary judgment before

the trial began. Because these claims were dismissed at an early stage, the court's decision does not speak directly to them, although a goodly amount of evidence as to the allegations was presented during the trial. With regard to the issues that were considered at trial, the district court discounted key testimony by the plaintiffs concerning events alleged to have occurred, finding it inconsistent and incredible. The findings of fact in the district court's opinion accept the defendant's denial of events.

Our role in addressing plaintiffs' arguments and reviewing the district court's findings of fact is a necessarily limited one. Under Fed. R. Civ. P. 52(a), "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the

trial court to judge the credibility of the witness." Issues of intent are included in the factual matters for the trier of fact to discern. Discriminatory intent means actual motive and is not a legal presumption to be drawn from a factual showing of something less than actual motive. Thus, a court of appeals may only reverse a district court's finding on discriminatory intent if it concludes that the finding is clearly erroneous under Rule 52(a). Pullman-Standard v. Swint, 456 U.S. 273, 287-89 (1982).

When the findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings. Anderson v. City of Bessemer City, North Carolina, _____ U.S. _____, 105 S. Ct. 1504, 1507 (1985). The major premise

behind the deference is that such findings of fact "depend peculiarly upon the credit given to witnesses by those who see and hear them." United States v. Yellow Cab Co., 338 U.S. 338, 341 (1949). Consequently, courts have been especially reluctant to resolve factual issues which depend on the credibility of witnesses. See United States v. Oregon State Medical Society, 343 U.S. 326, 332 (1952).

In the situation where a trial judge's findings are based on his decision to credit the testimony of one witness versus another witness, if each has told a coherent and facially-plausible story not contradicted by extrinsic evidence, that finding is almost never clear error. City of Bessemer City, 105 S. Ct. at 1513. It is only when the reviewing court, on the entire evidence, is left with a definite

and firm conviction that a mistake has been committed that an appellate court may reverse. United States v. United States Gypsum Co., 333 U.S. 364, 394-95 (1948).

The guidelines on questions of intent and pretext that a district court must apply, and which we must review, are complex ones. Direct evidence of discriminatory intent is seldom available; indirect or circumstantial evidence can suffice to prove state of mind. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714, n.3 (1983). It is that elusive state of mind that is the crux of our case, where plaintiffs have asserted a theory of Title VII liability based upon disparate treatment. Discriminatory intent is an essential element of proof for such claims because disparate treatment involves distinct actions by an employer which treat

certain people less favorably than others based on their race, color, national origin, religion, or sex. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335, n.15 (1977). The burden of persuasion as to the existence of a violation, including the element of discriminatory intent, remains on the plaintiff.

Once the plaintiff established a prima facie case, the defendant may dispel the presumption or inference of discriminatory conduct through evidence of nondiscriminatory reasons for its actions. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The defendant need not persuade the court that it was actually motivated by the proffered reason; it need only articulate--not prove--a legitimate, nondiscriminatory reason for its action. It

is sufficient if the defendant's evidence raises a genuine issue of fact whether it discriminated against the plaintiff. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981).

Finally, if the defendant meets its burden of presenting such a legitimate basis for its action, the plaintiff is given an opportunity to demonstrate that the "proffered justification is merely a pretext for discrimination." Furnco Construction Corp. v. Waters, 438 U.S. 567, 578 (1978); Davis v. Richmond, Fredericksburg & Potomac RR, 593 F. Supp. 271, 280 (E.D. Va. 1984). The burden is upon the plaintiff to prove by a preponderance of evidence that the defendant's proffered reason is not worthy of belief or that discriminatory reasons more likely motivated the defendant. Burdine, 450 U.S. at

256. This burden upon the plaintiff "merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." Id.

Rarely will there be "eyewitness" testimony with regard to the employer's mental processes. Aikens, 460 U.S. at 716. Rather, several types of objective evidence may be potentially probative of pretext. For instance, in the promotion context, a plaintiff may attempt to produce evidence that the defendant departed from its usual business procedure, or that the procedures by which a decision was made are suspect; plaintiffs might also point to evidence that there are no fixed or reasonably objective standards and procedures for evaluating the applicant. Love v. Alabama Institute for Deaf and Blind,

613 F. Supp. 436, 438 (N.D. Ala. (1984).

Evidence of a general atmosphere of discrimination may also be considered: proof of historically-limiting opportunity or harassment. Even where such past discriminatory acts are time-barred for purposes of a particular claim, the Supreme Court has stated that this type of showing "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." Holsey v. Armour & Co., 743 F. 2d 199, 207-08 (4th Cir. 1984), cert. denied, 105 S. Ct. 1395 (1985), citing United Airlines, Inc. v. Evans, 431 U.S. 553, 558 (1977). In addition, evidence of a general atmosphere of discrimination may be considered with other evidence bearing on motive in deciding whether a plaintiff has

met his burden of showing that the defendant's articulated reasons are pretextual. Id.; see also Furnco, 438 U.S. at 580; Sweeney v. Board of Trustees of Keene State College, 604 F. 2d 106, 112-13 (1st Cir. 1979). Thus, evidence of racial harassment or threats, though not the subject of a distinct claim, is relevant to the determinations of intent and pretext.

Finally, statistical proof may be a tell-tale sign of pretext even if it is not dispositive of the claim in and of itself. Richmond, Fredericksburg & Potomac RR, 593 F. Supp. at 280. Statistics with regard to the defendant's employment policy and practice may be helpful to a determination whether its action in a particular case conformed to a general pattern of discrimination. McDonnell Douglas, 411 U.S. at

805. Although statistics cannot alone prove the existence of a pattern or practice of discrimination, or even establish a prima facie case shifting to the employer the burden of rebutting the inference raised by the figures, "[s]tatistical analysis served and will continue to serve an important role" in cases in which the existence of discrimination is disputed. Teamsters v. United States, 431 U.S. 324, 339 (1977) citing Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620 (1974).

Defendant's proffered reasons must be looked at in the context of all these kinds of evidence, instead of merely standing alone. Plaintiff's initial evidence should be combined with the evidence arising from cross-examination in order to determine whether the defendant's reasons are legally

sufficient or whether they should be discredited. Williams v. City of Montgomery, 550 F. Supp. 662, 667 (M.D. Ala. 1982), aff'd, 742 F. 2d 586 (11th Cir. 1984), cert. denied, 105 S. Ct. 1756 (1985), citing Burdine, 450 U.S. 248 (1981). The trier of fact must judge whether the version of events as related by one party is internally consistent and plausible, or whether numerous inconsistencies and conflicting documentary evidence render the story unreliable. See Holsey, 743 F. 2d at 207.

We turn now to applying these general principles to a specific examination of each of the promotion and termination from employment claims and to the ultimate issue of whether the district court's factual findings are supported by the legally-relevant evidence.

III

Discharge Claims

A few preliminary remarks are appropriate to a consideration of both plaintiffs' discharge claims. Alfred and Alvin Warren instituted their action against Halstead seeking injunctive, declaratory, and monetary relief for alleged employment discrimination. First, both plaintiffs assert claims under Title VII, 42 U.S.C. Section 2000e, et seq. They claim they were discharged in retaliation for filing administrative charges of racial discrimination with the EEOC or for complaining to company management about racial discrimination in promotion.

Alvin alone raises a claim under 42 U.S.C. Section 1981,[4] which affords a federal remedy against discrimination in private employment on the basis of race.

Both Title VII and section 1981 claims are independent of each other, and the remedies available under each, although related, are separate, distinct, and independent. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975). Both claims require a proof of the same elements of a prima facie case, Gairola v. Commonwealth of Virginia Dept. of General Services, 753 F. 2d 1281, 1285 (4th Cir. 1985). For the purposes of this appeal, we will treat proof of the Title VII and section 1981 claims together.

Finally, it is only in discussion of Alvin's discharge claim that the district court refers to whether a prima facie case

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4 The district court dismissed all claims by Alfred Warren under section 1981 on defendant's motion for partial summary judgment.

has been made out, stating that "Warren possibly established" such a case. Warren, 618 F. Supp. at 508. However, in Alfred's other discharge claim (and the promotion claims of both brothers) the district court simply goes ahead to consider the issue of pretext. We will also go through an examination of each issue, including the allegation of pretext, as though a prima facie case existed and avoid, as the district court did, prematurely cutting off our analysis.

Alfred Warren's Discharge Claim

Halstead fired Alfred for excessive absenteeism and lateness. The district court made a finding of fact that plaintiff experienced attendance problems after completing probation and received several progressive disciplinary warnings, in accor-

dance with Halstead's Employee Handbook.[5] Based on its findings, the district court reached its conclusion that Alfred was dismissed because he failed to satisfy his

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[5] The court found that on December 8, 1978 Warren was given a written warning because he had been absent nine days in a three-month period and late or absent from work twelve other part days. On December 29, 1978 he received a second written warning and a three-day suspension for continued absence and lateness. Warren, 613 F. Supp. at 502.

The court found that Alfred was then absent from work on January 15, 16, and 20, 1979. A doctor's note was furnished by him dated January 16, 1979 stating that he was under doctor's care for "fatigue syndrome." The company did not consider this note to be a satisfactory medical excuse for his recent absences because the note did not state that Warren had to be out of work for any specific period of time, although Halstead did not so inform Alfred. On January 20, 1979 company officials made their decision to terminate him. Plaintiff was again absent from work on January 21, 1979; when he returned on January 22, Assistant Personnel Manager Tommy Cook met with Alfred and notified him of his termination. Id. at 502-03.

employer's reasonable expectations for attendance. Id. at 506-07.

The distict court noted that Alfred's discharge followed the filing of his EEOC charge (the charge was filed on January 15, 1979 and the decision to terminate was made on January 20). Id. We note that there are also other circumstances surrounding Alfred's discharge that might suggest pretext.[6] However, even proof that individual days here and there recording Alfred

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[6] As examples, Alfred Warren was recorded as absent for January 20, 1979 (the day the decision to terminate him was made) (Vol. VIII, p. 123.); yet he denies he was scheduled to work on that Saturday and casts some doubt on the written statement. It was company practice to have some employees on a shift work on Saturday; other employees would be notified by a supervisor that they were not to report and would not be counted absent. Id. at 103. The policy was not a formal one: names of those scheduled by the supervisor to work might be posted, or employee simply told by

Warren's absences may have been inaccurately charged against him does not overcome the evidence of the large number of absences and tardy days which remain. Alfred attempts to rebut that record by asserting that whole blocs of recorded

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(footnote continued)

a supervisor. Assistant Personnel Manager Cook admitted that he did not know if Alfred's name was posted for that day, admitted that the Cost Center sheet showing Alfred absent had a lot of scratching on it (Vol. IV, p. 47.), and admitted that he did not bring to the court any posting sheet with Warren's name. (Vol. VIII, pp. 103-04.) Personnel Manager Allen appears to acknowledge on cross-examination that the marking of Warren absent for the day was an error. (Vol. IV, p. 27.)

Again, as to absences of January 15, 16, and 17, 1979, Allen acknowledged that he made a "bad assumption" that the doctor who gave Alfred Warren a medical excuse for fatigue syndrome would "give anybody a medical note." Allen also admitted he never told Warren that the excuse would be given "very little" weight. (Vol. IV, pp. 24-25).

absenses were falsified because they represented "work injuries on the job."[7] These are serious allegations by the plaintiff because they go to the bulk of days listed as absences. But plaintiff does not present any kind of written evidence, such as accident reports or supervisor's notes, that he was sent home for work-related injuries and that they should not be counted as absences.

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[7] Halstead's company manual states that "[a]n employee who sustains an accident on the job which causes him to lose work, as confirmed by a physician, will not be penalized for his absences, provided they dc not exceed sixty (60) calendar days." (Vol. I, p. 86.) Nevertheless, Alfred was charged as absent for ten days even though he was receiving Workmen's Compensation for a work-related injury (Vol. III, p. 127). Again, he was listed eight hours absent on January 6, 1979 when he claims to have begun the shift, had a work injury with a hammer, and been sent home. (Vol. IV, p. 92.) Also, Alfred claims that on numerous days he was marked as "absent" or

Even more basic, even if Alfred was off days with illness related to his work, he still was absent, and under Halstead's policy there is no distinction between excused and unexcused absences. The policy and practice did not require discipline after a particular number of absences. (Jt. App. Vol. VI, p. 21.) Such a loose, subjective absenteeism policy may indeed be susceptible to manipulation for a discriminatory reason. However, the burden is on the plaintiff to show that the general policy was applied in a discriminatory manner to him in particular. At Halstead all employees were subject to the same

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(footnote continued)

"left early" because he suffered work-related problems (specifically, bronchial congestion from breathing copper fumes) and was sent home with the company's permission. (Vol. IV, p. 97.)

policy in that there were no unexcused absences. White employees (e. g., Powell Whitten, Vol. II, p. 48, Vol. VII, p. 82) had Workmen's Compensation days and on-the-job injuries treated as absences. The question of whether the employer's policies or decisions are harsh, unfair, or inappropriate is not at issue, absent some showing of discrimination. Payne v. Blue Bell, Inc., 550 F. Supp. 1324, 1326 (M.D. N.C. 1982).

Even if discriminatory animus or retaliation is " in part" a reason for the adverse employer actions, in this circuit a more stringent standard applies and requires that the plaintiff show that he would not have been discharged "but for" the filing of the charge on the protected activity. Ross v. Communications Satellite Corp., 759 F. 2d 355, 365-66 (4th Cir.

1985). See also Lovelace v. Sherwin-Williams Co., 681 F. 2d 230, 243-44 (4th Cir. 1982). The standard is designed to ensure that the mere fact that an employee files an EEOC charge does not immunize him from legitimate discipline for an unsatisfactory performance. EEOC v. Federal Reserve Bank of Richmond, 698 F. 2d 633, 668-89 (4th Cir. 1983), rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank, _____ U.S. _____, 467 U.S. 867 (1984).

In the case before us, Alfred Warren was a marginal employee with regard to his absenteeism. He received a series of warnings for poor attendance in accordance with company policy. During the time Alfred worked for Halstead, twenty-two employees were terminated for excessive absenteeism. (Jt. App. Vol. II, p. 46.)

While some of these twenty-two employees were terminated with greater or fewer absences than plaintiff, Warren was treated the same as other employees under defendant's discipline practices. (Jt. App. Vol. VI, pp. 3-4.) The district court found that Alfred's attendance problems were well-documented, Warren, 613 F. Supp. at 506,[8] and we cannot disagree.

The law of this circuit is that the discharge of an employee on attendance, if properly established, is sufficient to rebut an inference of discrimination and shift the burden of production to the plaintiff in a disparate treatment case. Federal Reserve Bank, 698 F. 2d at 668-69.

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[8] Alfred Warren disputes that he was late on all the dates noted on his personnel records (Vol. VII, p. 126), but presents no factual rebuttal to the time-cards.

Plaintiffs raise insufficient proof that Halstead's rationale for discharge--absenteeism--was a mere pretextual cover for its discrimination. Based on our review of the record, we conclude that the district court was not clearly erroneous in holding that Halstead discharged Alfred based on his absenteeism and not in retaliation for filing an EEOC charge or for complaining to management about racial discrimination.

We, therefore, affirm the district court's determination of Alfred Warren's discharge claim.

Alvin Warren's Discharge Claim

Halstead fired Alvin for wasting company time and for failure to cooperate. The district court made a finding of fact that prior to this discharge, Alvin received a written warning for absenteeism

on December 11, 1978, and a written warning and three-day suspension for wasting company time on January 11, 1979. Warren was terminated February 2, 1979 in accordance with Halstead's progressive discipline system. Warren, 613 F. Supp. at 503-05.

The court did note that Alvin had "possibly" established a prima facie case of discrimination through a combination of the timing of his EEOC charge and his discharge which occurred approximately two weeks later, together with the subjective nature of many of his alleged job deficiences. However, it concluded as a matter of law that Alvin's termination was not because of race or in retaliation for his protected activity, but for continuing the conduct for which he had been previously reprimanded. Id. at 508-09.

The court reached its conclusion after it carefully considered the plaintiffs' testimony and found it incredible--"equivocal, inconsistent, and often contradictory." Id. at 509. This was based on the court's perception of the uncertainty of plaintiffs' testimonial recall of events, as well as the court's stated conviction that "[v]irtually the only evidence that such instances [harassment] ever occurred was the testimony of the Plaintiffs themselves." Id. On the other hand, the district court found the defendant's proffered explanation worthy of credence, pointing to other black employees who were promoted and white employees who were terminated. Id. at 508. After according the district judge's better vantage point the deference we must, we are convinced that the court's credibility

assessment cannot serve as a rational basis for the findings made here.

As this circuit has pointed out earlier, "[c]redibility involves more than demeanor and comprehends an overall evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Miller v. Mercy Hosp., Inc., 720 F. 2d 356, 365 (4th Cir. 1983), citing 9 C. Wright & A. Miller, Federal Practice & Procedure: Civil Section 2586, pp. 736-37 (1971). We have carefully reviewed the voluminous record and are persuaded that a more accurate characterization of Halstead's testimony is that it reveals remarkably similar failures of recall and ambiguity--but with the added feature of multiple, serious inconsistencies between defendant's testimony

concerning Alvin's discharge and the testimony of other witnesses and the documentary evidence.

To begin, there is extensive testimony by defendant's witnesses that they had no knowledge of complaints of racial discrimination by plaintiffs. Personnel Manager Allen denied on direct examination that Alvin Warren ever came to him to talk about discrimination toward black employees either in October 1978 (at the time of Smothers' and Gann's promotions), or at any time before the employees' attempted meeting with Terlinden on January 19-20 (Vol. VI, p. 127). Yet on cross-examination, Allen was forced to admit that this testimony was contradicted by company records.[9] Defendant witnesses' denial of meeting in October with black employees protesting recent promotions is contradict-

ed by the eye-witness testimony of Golden, a former employee who was part of the group.[10]

Additionally, the testimony of the personnel manager and plant manager as to the December 19 and 20 events is directly contradictory.[11] All of defendant's witnesses have similarly denied ever taking

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[9] Allen was shown an inter-plant memorandum dated January 17, 1979 which he had signed stating: "Alvin then said the problem was that he was black. He said that blacks could not be promoted out there." (Vol. VI, p. 128.) In response to this contradiction, Allen was forced to concede: "That's the only time he made that complaint." Id. at 129.

Additionally, the notes made by Allen on February 2, 1979 (Alvin Warren's discharge date) indicate: "I have talked with Alvin on at least three times. . . . The fact is, that rather than being a valuable employee he is a detriment to the company. . . . Up to this point in Alvin's mind, we have been unfair to him because he is black." (Vol. VI, p. 131.)

part in or knowing of harassment directed at the Warrens, such as hollering or "butt rubbing." Yet, Golden testified not only that he was present during such harassment of the plaintiffs, but that it was also directed at him.[12] Omitting any reference to Golden's direct testimony, the court concluded that "[v]irutually the only evidence that such instances ever occurred was the testimony of the Plaintiffs themselves." The court makes Finding of

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10 Golden testified that the group met with Allen in October to protest racially discriminatory promotions and was told to "get the hell out." (Vol. III, p. 121.)

11 Allen testified that when Alfred Warren and his group came to talk to Terlinden, Allen went up to tell Terlinden that the employees wanted to see him (Vol. IV, p. 15). McClain confirms this (Vol. VIII, p. 15). Terlinden flatly denies that Allen reported this to him. (Vol. III, p. 155).

Fact #24: "Plaintiffs did not bring to the attention of management during their employment any complaints about supervisors rubbing them or trying to engage in homosexual activities." Warren, 613 F. Supp. at 504-05, 508.

The decision to terminate Alvin Warren was based on the note cards documenting his

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12 Golden testified that after the black employees in his group complained to Allen in October 1978 about discrimination in promotions, Smothers, Gann, and other supervisors would stand in front of him on his machine to hinder him from getting out production, holler at him right in his face, and brush up against his behind or put their hands on his behind. He related that the same actions were taken against Alfred Warren, while he was working as his helper. (Vol. III, pp. 123-26.) Golden testified that he, as well as Alfred, was falsely accused of overstaying his breaks or remaining for too long a period in the washroom following their complaints about discrimination. (Vol. III, p. 128.) Golden further testified that Smothers and Gann told him they were glad when Alfred Warren was terminated. (Vol. III, p. 130.)

"lack of cooperation" kept by Warren's immediate supervisors, Sands and McClain. The district court was concerned about this evidence,[13] and its concern about possible pretext was well-taken. Both Allen and

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[13] The court commented:

> Because of the subjective nature of the alleged infractions, the documentary proof introduced by the Defendant does not establish infractions of company rules with the same clarity as the records of Alfred Warren's absenteeism. In addition, the written notations made by Alvin Warren's supervisors as to the instances of wasting time, while not unprecedented, were not the type of records routinely kept on all employees in B-bay of the production department. Therefore, the court must consider carefully the possibility that Defendant singled out Alvin Warren and proceeded to "build a record" to justify his discharge. Furthermore, there is no question but that by February 2 the Defendant had knowledge of the January 15, EEOC charges filed by both Plaintiffs. Alvin Warren's complaints to management about promotions and his treatment by supervisors are also uncontradicted.

Warren, 613 F. Supp. at 508.

McClain testified that keeping such cards in a file box on a foreman's desk and relying on them for discipline was routine plant policy, in fact, "mandatory." (Vol. VII, p. 116; Vol. IV, p. 43.) Yet, the plant manager characterized the practice as "not normal," but, in fact, "strictly exceptional." (Vol. III, p. 148.)

The taking of notes began with a first warning about "lack of cooperation" on December 20, 1978, the day of the attempted meeting with Terlinden. Defendant's witnesses deny any discriminatory intent, but Allen and Terlinden admit that they cannot remember any white employees that notes were kept on (Vol. VII, p. 59, Vol. III, p. 149) except Kendrick. Coincidentally, Allen remembers that Kendrick was the only white employee in the group that attempted to see Terlinden in December

(Vol. VII, p. 141). In fact, McClain cannot remember another employee of any race who was terminated for lack of cooperation. (Vol. IV, p. 62.)

As to the content of the "lack of cooperation" with which Alvin was charged, the testimony shows that the term was hopelessly elastic and subjective and only served a pretextual--rather than a legitimate--company function. Allen testified that he "tried many times to explain what lack of cooperation meant" including basketball analogies. (Vol. VII, p. 54.) It is not surprising that Alvin Warren testified that he never understood what he was being written up for when we look at the formless definition Allen offers.[14] Contrast that to the narrow interpretation contained in the Employee Handbook and referred to by Terlinden.[15]

Even accepting Allen's broad definition of "lack of cooperation," the information on the cards is contradictory within its own system.[16]

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[14] Allen explained lack of cooperation as meaning everything from attendance problems (Vol. VII, p. 57), to having a headache or being ill on the job (Vol. IV, p. 37), to failing to change-over a machine or follow job instructions (but he could not remember any instance when Alvin failed to do that). (Vol. IV, pp. 39-40.) As Allen commented, "it is just a discretionary concept." (Vol. IV, p. 41.)

[15] Terlinden interpreted "lack of cooperation" to mean that when a supervisor gives an employee an instruction to do something on the job, the employee is supposed to do it. (Vol. III, p. 153.) Terlinden stated that "if an employee is getting the work out there would be no problem with lack of cooperation." Id.

[16] Write-up on December 20, 1978 for Alvin Warren (date of attempted meeting with Terlinden at the beginning of the shift): "Lack of cooperation with foreman, did not start to work until 11:20 hours, went to bathroom 1:00 o'clock p.m. to 1:10 p.m." (Vol. IV, p. 67.) Even Smothers,

Briefly, we simply note other relevant evidence that also goes to raise an inference of pretext. There is the proximity of the filing of the EEOC charge of January 15, 1979 and Alvin Warren's firing on February 2, 1979, including the inconsistent testimony by company officials regarding the ~~date~~ they were first made aware of the charge.[17] Such close proximity can raise an inference that the discharge had a retaliatory motive. EEOC v. St. Joseph Paper Co., 557 F. Supp. 435, 442 (W.D. Tenn. 1983). Finally, there is the statistical evidence presented by the

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(footnote continued)

who used a stop-watch to time breaks, had to admit that a ten-minute break was acceptable. (Vol. IV, p. 65; Vol. VIII, p. 24.) Lower level supervisor Gann was not even aware that there was a rule as to how long an employee could remain in the washroom. (Vol. IV, p. 75.)

plaintiffs' expert witness showing that the number of blacks discharged from Halstead in 1978 and 1979 was at a deviation rate higher than would be explained by chance, and, in fact, was in a range where an inference of discrimination is raised.[18] EEOC v. American National Bank, 652 F. 2d 1176, 1192 (4th Cir. 1981), cert. denied, 459 U.S. 923 (1982).

Having reviewed all the evidence, we are forced to the difficult conclusion that the determination of the district court on the discharge claim of Alvin Warren is

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[17] At deposition, the personnel manager could not recall when he received a copy of the charge filed on January 15. Yet, at trial, Allen testified that he was sure he received it on January 23, according to his notes (placing receipt after Alfred Warren's termination). (Vol. VII, p. 24). McClain thought he had become aware of the charge on the "18th, 19th, 20th of January," but settled on "the end of January." (Vol. IV, p. 53.)

clearly erroneous. The court has failed to evaluate the contradictions between the defendant's witnesses' testimony and documentary evidence. The court has given little consideration to the timing of the note cards kept on Alvin's performance, or to the subjective content of their discipline, even though the more subjective the criteria in a defendant's proffered reason, the more difficult its task in meeting the production burden established in Burdine.[19] The white employees referred to by the

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[18] The standard deviation for comparison of discharge of black and white employees at Halstead in 1978 was 9.08 and in 1979 was 8.18, where a standard deviation greater than two or three necessarily excludes "chance" as the cause of under representation. Halstead argued that these statistics were flawed, being based on a "snapshot" view of discharges versus a yearly total. However, the statistics are based on the figures plaintiffs were given by defendant's answers to interrogatories.

district court as being discharged in a like-situation were in fact not comparable.[20]

Finally, the court has given great weight to the weaknesses of recall that plaintiffs showed at times and then characterized their testimony as inconsistent,

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19 Additionally, it is a highly suspect practice to place allegations of misconduct on poor work performance in an employee's personnel file without notice to the employee. Mays v. Williamson & Sons Janitorial Services, 591 F. Supp. 1518, 1522 (E.C. Ark. 1984), aff'd, 775 F. 2d 258 (8th Cir. 1985).

20 The four white employees the court refers to in Finding of Fact #21 include three probationary employees (Roger Carter, David Browning, and Robert Carter) with low ratings; Alvin Warren was not probationary and not terminable at will. The fourth employee, Vernon Carter, walked off the job, swore at the supervisor, and admitted he did not work during the morning; he was discharged for violation of three specific company rules and said he knew it was his fault. (Vol. II, pp. 61-63.) No note cards were kept on any of these white employees. (Vol. VIII, p. 7.)

where the record indicates primarily ambiguity, literalness.[21] There is always, of course, the possibility that protestations of inability to recall are merely "stonewalling." But where the failures of recall on one side are matched by unconceded but demonstrable failures of equal or greater magnitude on the other, it would seem a most questionable factfinding process to resolve them by forgiving one set of failures and ascribing the other to lack of credibility. Mercy Hosp., Inc., 720 F. 2d at 367.

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[21] As to literalness, at deposition Alvin denied hearing any racial slurs made by management; he defended that answer at trial, saying that what he alleged management said to him was instead "all comments, personal opinions" that "offended me" because they dealt with race. We must take into account plaintiffs' age, inexperience, and lack of familiarity with the witness stand.

We must conclude that the court's factual findings are the result of a fact-finding process that does not meet our principled standard. In holding that Alvin was not discharged for discriminatory reasons, the district court has made findings that are simply not supported by substantial evidence and fail to take into account substantial evidence to the contrary. See Moore v. City of Charlotte, North Carolina, 754 F. 2d 1104 (4th Cir.), cert. denied, 105 S. Ct. 3489 (1985).

We do not reach such a conviction based simply upon a perception derived from a de novo review of the record that the "actual" facts are other than those found. Our review instead focused upon the factfinding process, rather than directly on the factfinding result. Where, because of mistakes in the factfinding process, the

district court's critical findings fail to be supported by the requisite preponderance of evidence, we must reject the district court's determinations regardless of the deference required by Rule 52(a). See Mercy Hosp., Inc., 720 F. 2d at 361.

As this circuit said in that case:

> Even as we adjudge the findings here to be clearly erroneous, we must be prepared to concede--and do-- that by some process this experienced, sensitive, justly respected trial judge may indeed have "found" the "true" facts. We only have the power, and the responsibility, to say that on the evidence of record he could have done so only on the basis of an intuition or insight whose probable accuracy lies beyond the capacity of an appellate court to review on any principled basis. Assessed according to legal standards of rationality in drawing inferences of motivation from raw historical facts in evidence and under controlling burdens of proof, the ultimate finding of discriminatory motivation in this case must be rejected as clearly erroneous.

Id. at 369-70.

We reverse the district court's

determination on the discharge claim of Alvin Warren and remand this portion of the judgement for consideration as to relief.

Promotion Claims

Finally, both Alfred and Alvin Warren raise claims of racial discrimination as to promotions under Title VII. Plaintiffs do not challenge the promotion policy of Halstead in general, but instead allege discriminatory treatment in the way it was applied to them. The Warrens specifically allege that white employees were promoted to leadmen over them,[22] out of the proper seniority sequence.

The district court found that the company seniority policy was set up on the basis that Halstead

> [u]sed departmental seniority as the primary criterion for promoting employees to available leadmen positions. When an opening occurred, the employee with the most departmental seniority was promoted unless he was

> not qualified or did not want the position.

Warren, 613 F. Supp. at 502. The district court concluded, as a matter of law, that the promotions of white employees Smothers and Gann "were in accordance with company guidelines" because they had more seniority than the plaintiffs. As to Boles' promotion the court concluded that

> [a]lthough Stephen Boles had approximately six weeks less seniority than the Plaintiffs, his promotion to leadman was only a temporary one for two weeks. For the court to conclude that this brief isolated occurrence is evidence of racial discrimination against the Plaintiffs required a quantum leap which the court is unwilling to make.

Id. at 506.

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22 Leadmen received 16 cents per hour extra pay, reported for work one-half hour earlier, and according to the Employee Handbook had certain supervisory duties, such as assigning jobs and maintaining records. (Vol. I. p. 86; Vol. II, p. 13.)

A. Promotion Claim as to Boles

We turn first to the promotion of Stephen Boles. There is no dispute among the parties that Boles was hired by Halstead on July 31, 1978, approximately six weeks after plaintiffs were hired. On December 18, 1978 Boles was promoted to a temporary leadman position in B-bay. The factual dispute occurs at this point concerning Boles' status until March 23, 1979, when he was made a bench operator leadman. Defendant's witnesses testified that Boles returned to his bench operator's position two weeks after his temporary promotion on December 18 because his leadman and supervisor returned to work from vacation. Halstead's representatives assert that there were no leadmen vacancies in December 1978 and that Boles' upgrade was only a temporary measure to cover the

one weeks's vacations for the regular leadman and shift foreman. (Vol. VI, pp. 146-47.)

The difficulty with the district court's acceptance of this version of events in its findings of fact as to Boles' "temporary upgrade" is that Halstead's own records contradict it. It is true that the Halstead "Personnel Policies and Procedure" manual allows temporary transfers (not to exceed one week) without regard to qualifications or seniority. (Vol. II, p. 9.) But, Boles' "temporary transfer" lasted for approximately thirteen weeks.[23]

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[23] Personnel Manager Allen admitted on cross-examination that the Employee Service Records showed Boles continuing to receive the 16 cents-hourly increase in salary as leadman from December 18, 1978 until his next change in job on March 23, 1979. Allen characterized this as a "mistake," said he could not locate the paycard

It is not the appropriate role for a court to second-guess the evidence before it and rely on one party's contention that it "could have" brought the evidence supporting its story to the factfinder. On their face, the company records corroborate plaintiffs' claim that a white employee with six-weeks less seniority was promoted over them. Plaintiffs have thus made out a prima facie case of discrimination in promotion and successfully rebutted Halstead's proffered non-discriminatory reason that plaintiffs had less seniority. We have no choice but to find the district court's

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(footnote continued)

because it was missing from the file, but contended that the payroll registers would substantiate his position that Boles' "reverted" to his old status after a two-week move up. However, Allen said, "he hadn't had time" to find those other records and had brought no other documents with him. Id.

Finding of Fact #8 and its conclusion of law based on that finding of fact to be clearly erroneous. Therefore, with regard to Boles' promotion, we reverse and remand to the district court for consideration of granting relief to the plaintiffs.

B. Promotion Claim as to Smothers and Gann

Lastly, we consider the other two promotion claims. The district court made a finding of fact that both Smothers and Gann had greater company and departmental seniority than either plaintiff; on that basis the court concluded, as a matter of law, that the promotions were in accordance with company guidelines and did not reflect a discriminatory animus. Warren, 613 F. Supp. at 506.

The difficulty with the district court's findings is that there is conflicting testimony over several issues: the

hire date for Smothers and Gann, their department seniority, whether either went back into construction work after coming into plaintiffs' department, whether plaintiffs first trained Smothers and Gann on the job, etc. (Vol. III, pp. 16-21; Vol. VI, p. 81.) In a promotion question where conflicts in testimony exist, courts usually look to company records to resolve the issue. This is reasonable because company records constitute objective evidence of hiring dates, job classifications, seniority, and pay levels; such records are precisely the type of evidence which can resolve contradictions in testimony and credibility questions.

Yet, in the case before us, careful review of the eight volumes of trial transcript and the district court's opinion does not reveal one reference to records

offered into evidence by Halstead to resolve these promotion issues.[24] The evidence may appear in some part of the record which has not been available to us. We can only conclude on the basis of the record before us that the district court accepted the defendant's factual allegations regarding Gann's and Smothers' basic

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[24] Indeed, the only company records that were offered into evidence on the promotions of Smothers and Gann were offered by plaintiffs and met by defendant's objection. Plaintiffs attempted to introduce into evidence a rate card showing the date Smothers was promoted to the bench operator leadman position, but Halstead objected on the basis that Alfred was not competent to testify about company records other than his own personnel records. The court sustained the objection. (Vol. III, pp. 14-15.) Instead, Halstead offered to stipulate as to the promotion date of Smothers and Gann. (Id. at 15, 18; Vol. V, p. 100-01.) It appears that no documentary evidence was offered by defendant on the original hire date, departments, departmental seniority, etc.

employment information in the absence of documentary evidence. If so, the court failed to indicate on what basis it credited defendant's testimony over plaintiffs.

The district court may very well be entirely correct in its factual findings on the promotion issue, and therefore correct in its conclusion of law resting on them. But we, as an appellate court, simply cannot conduct an adequate review based on such a record. See Lewis v. Bloomsburg Mills, Inc., 773 F. 2d 561, 577-78 (4th Cir. 1985). Consequently, we remand the promotion issue as to Gann and Smothers to the district court for clarification as to the evidence relied on for its determination. If relevant company records were never put into evidence, that fact should be noted and inferences drawn

therefrom.

With regard to the claims concerning the promotions of Gann and Smothers, we remand the case for further clarification of the record.

IV

For the foregoing reasons, we affirm the district court in part, reverse in part, and remand for further proceedings consistent with this opinion.

(1) As to the claim of Alfred Warren that he was discharged in retaliation for filing administrative charges of racial discrimination with the EEOC or for complaining to management about racial discrimination in violation of Title VII, we affirm the district court and hold that defendant prevails.

(2) As to the claims of Alvin Warren that he was discharged because of his race in violation of section 1981 and that he was discharged in retaliation for filing administrative charges of racial discrimination with the EEOC or for complaining to management about racial discrimination in violation of Title VII, we reverse the district court and hold that plaintiff prevails. We remand to the district

court for consideration of relief.

(3) As to the claims of both Alvin and Alfred Warren that defendant failed to promote both plaintiffs to leadmen and instead promoted Stephen Boles with less seniority, we reverse the district court and hold that plaintiffs prevail. We remand to the district court for consideration of relief.

(4) Finally, as to the claims of both plaintiffs that defendant failed to promote them to leadmen and instead promoted Jimmy Gann and Greg Smothers with less seniority, we are unable to make a determination from the record as it stands. We remand to the district court for clarification.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1575

ALVIN WARREN and
ALFRED WARREN,
Appellants,
versus

HALSTEAD INDUSTRIES, INC.,
Appellee,
and
CHAUFFEURS, Teamsters and Helpers Local Union No. 391, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Defendants.

Appeal from the United States District Court for the Middle District of North Carolina at Winston-Salem. Frank W. Bullock, District Judge. (C/A 82-153)

Argued June 1, 1987
Decided January 4, 1988

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, CHAPMAN, WILKINSON, and WILKINS, Circuit Judges, sitting En Banc.

Harvey L. Kennedy, (Harold L. Kennedy, III, Kennedy, Kennedy, Kennedy and Kennedy, on brief) for Appellants; James B. Spears, Jr., (Thomas A. Bright, Haynsworth, Baldwin, Miles, Johnson, Greaves and Edwards, on brief) for Appellee.

PER CURIAM:

After reargument of this case to the en banc court, the court is of opinion that the fact finding of the district court was not clearly erroneous. We are of opinion that the district court did not commit reversible error either in the facts that it found or in its methods.

We have examined the record and are of opinion that the facts found by the district court are supported by the record, are not clearly erroneous, and are plausible. They are largely based on testimony taken ore tenus in open court, which are entitled to heightened deference under Anderson v. City of Bessemer City, 470 U.S. 564 (1985). So far as they are not based on oral testimony, they are based on weight of the evidence and documentary evidence, much of which was supported by oral

testimony, and those fact findings are also supported by the record and are plausible.

We note that the opinion and judgment of the panel was vacated by the granting of rehearing en banc under Local Rule 35(c). We are now of opinion that the district court should be affirmed for the reasons expressed in its careful and thorough opinion.

AFFIRMED.

WINTER, Chief Judge, concurring and dissenting:

Having reheard this case in banc, I am persuaded of the error of my previous vote to reverse the district court's dismissal of plaintiffs' claim that they were denied on account of their race a promotion to leadman given to Stephen Boles. I therefore vote to affirm the district court's

judgment in this respect.

I remain, however, persuaded that the district court committed reversible error in dismissing Alvin Warren's claim of retaliatory discharge. In this respect I would reverse and remand for the reasons set forth in the majority panel opinion,[1] and I respectfully dissent from the contrary conclusion.

In all other respects, I concur in the majority opinion.

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[1] I now recognize that on this issue, the panel opinion contains minor factual errors. It is correct, however, in demonstrating that the district court's findings on the central issue of pretext were implausible and based on contradictory accounts of the reason for Alvin Warren's discharge, and, for that reason, Alvin was entitled to affirmative relief.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA
WINSTON-SALEM DIVISION

ALVIN WARREN and ALFRED WARREN,	)	
Plaintiffs	)	
v.	)	CIVIL NO. C-82-153-WS
HALSTEAD INDUSTRIES, INC.,	)	
Defendant	)	

MEMORANDUM OPINION

BULLOCK, District Judge

Plaintiffs, Alfred and Alvin Warren instituted this action against Halstead Industries, Inc., seeking injunctive, deeclaratory, and monetary relief for alleged discrimination in employment because of their race. Plaintiffs allege that Defendant

violated 42 U.S.C. Section 1981 (the Civil Rights Act of 1866) and 42 U.S.C. Section 2000e et seq. (Title VII of the he Civil Rights Act of 1964) in various ways. The court granted partial summary judgment for the Defendant on October 21, 1983, and dismissed certain of the claims. The issues tried by the court during the five-day trial and remaining for decision are:

(1) was Plaintiff, Alvin Warren discharged on account of his race in violation of Section 1981; (2) was Plaintiff, Alvin Warren discharged in retaliation for filing administrative charges of racial discrimination with the Equal Employment Opportunity Commission (EEOC) or for complaining to management about racial discrimination

in violation of Section 1981; (3) were both Plaintiffs discharged in retaliation for filing administrative charges of racial discrimination with the EEOC or for complaining to management about racial discrimination in violation of Title VII; and (4) did the Defendant fail to promote both Plaintiffs to various leadmen positions on account of their race in violation of Title VII?[1]

The court, having heard the testimony of witnesses for both sides and observed each witness's manner of testifying, and having considered the exhibits in the record, and the arguments and briefs of

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[1] In its memorandum opinion of October 21, 1983, on summary judgment, the court left open the questions of

counsel, makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

Background

1. Plaintiffs, Alfred and Alvin Warren are black former employees of the Defendant, both being hired on June 12, 1978. prior to their employment with Defendant,

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(footnote continued)

whether a claim for retaliatory discharge for filing a charge of discrimination with the EEOC is actionable under 42 U.S.C. Section 1981, and whether the same claim may be pursued in court under Title VII without first filing an administrative charge based on such discharge with the EEOC. However, for the purposes of its decision in this case, the court has considered the retaliatory discharge claims to be properly before it under both Section 1981 and Title VII.

both had graduated from high school and attended Winston-Salem State University for two years. Both are "employees" within the meaning of the provisions and coverage of Title VII and 42 U.S.C. Section 1981.

2. Halstead Metal Products, Inc., is a subsidiary of Halstead Industries, Inc., a Pennsylvania corporation licensed to do business in the state of North Carolina and engaged in the manufacture of copper tubing. The company is an "employer" as defined under Title VII and is subject to the court's jurisdiction under 42 U.S.C. Section 1981.

3. The company began production of copper tubing at its plant in Pine Hall, North Carolina, in December 1977. Prior to the start-up of production, the company's employees were engaged in the construction of the plant. Construction continued

simultaneously with production after December 1977 but was eventually phased out after the plant's completion in June 1979. During the time Plaintiffs were employed by the Defendant, the Defendant has four departments: (1) production; (2) construction; (3) maintenance; and (4) machine shop.

4. Plaintiffs were each hired by the company's personnel manager, Clyde Allen, white, on June 12, 1978, in B-bay of the production department. At the time of hiring, they were given a copy of the company's employee hand-book and informed of the company's policies and procedures, including the company's policy of promoting the most qualified employees with the greatest departmental seniority to available positions.

5. Plaintiffs' claims of racial dis-

discrimination in promotion center around the company's promotion of three white individuals to leadmen positions in the B-bay area of the production department. These individuals were Greg Smothers, Jimmy Gann, and Steven Boles. Smothers was hired by Defendant as a utility laborer in the con-struction department on May 9, 1977, and transferred into B-bay of the pro-duction department as a draw bench helper in December 1977. Thus he was already employed in that department on June 12, 1978, when Plaintiffs were hired. Smothers never worked in construction after December 1977. He was promoted to leadman in B-bay of the construction department on September 11, 1978.

6. Jimmy Gann was employed by Defen-dant as a utility laborer in the construc-tion department on March 29, 1978, and

transferred into B-bay of the production department on May 12, 1978. Thus he was already employed in that department when Plaintiffs were hired. He never worked in construction after May 1978. Because Gann had transferred to the production department prior to the completion of his ninety-day probationary period, his initial hire date became his departmental seniority date in the production department in accordance with company policy. Even so, Gann had been working in the production department for approximately a month when Plaintiffs were hired.

7. Steven Boles was employed by Defendant on July 31, 1978, approximately six weeks after the Plaintiffs were hired. On December 18, 1978, he was promoted to a temporary leadman position in B-bay for two weeks while his regular leadman and super-

visor were on vacation. Defendant's witnesses testified that Boles returned to his bench operator's position after two weeks, although his employee service record indicates that he held this position until he was made a bench operator leadman on March 23, 1979, after Plaintiffs were terminated. Since there were no leadman vacancies open in December 1978 and both Boles' leadman and supervisor did return to work from vacation, the company's records mistakenly failed to note that Boles returned to his normal job assignment after these two weeks.

8. Defendant used departmental seniority as the primary criterion for promoting employees to available leadmen positions. When an opening occurred, the employee with the most departmental seniority was promoted unless he was not quali-

fied or did not want the position. Both Greg Smothers and Jimmy Gann had greater company seniority and greater departmental seniority than did either Plaintiff. Consequently, neither Plaintiff was actually considered for promotion to leadman by the white department manager, Bill McClain. Although Steven Boles began work for the Defendant approximately a month and a half after the Plaintiffs, he was not actually promoted to leadman but only filled in as a temporary substitute for his leadman and supervisor for a period of two weeks.

9. During the time Plaintiffs were working at the company, the Defendant had black leadmen, including Jerry Joyce, in the casting department, and Carl Millner, in the annealing furnace. Prior to February 2, 1979, the date of Alvin Warren's termination, two other blacks, Gary

Calloway and Carl Scales, were promoted to leadmen in B-bay.

The Discharge Claims

Alfred Warren

10. Plaintiff Alfred Warren is a black citizen of Winston-Salem, North Carolina, and was hired by the Defendant on June, 12, 1978, as a utility laborer in its plant in Pine Hall, North Carolina. Prior to his employment with Defendant, he had graduated from high school and attended Winston-Salem State University for two years. He had also held summer jobs at R.J. Reynolds Tobacco Company and Duke Power Company, and had worked at McLean Trucking Company for eight months. Alfred Warren successfully completed his ninety-day probationary period on September 12, 1978. He experienced attendance problems

after completing probation and received several progressive disciplinary warnings in accordance with Defendant's employee handbook. On December 8, 1978, he was given a written warning because he had been absent nine days in a three-month period and late or absent from work twelve other part days. On December 29, 1978, he received a second written warning and a three-day suspension for continued absences and lateness.

11. Alfred Warren was absent from work on January 15, 16 and 20, 1979. A doctor's note was turned in by him dated January 16, 1979, stating that he was under a doctor's care for "fatigue syndrome." The company did not consider this note to be a satisfactory medical excuse for his recent absences, since it did not state that he had to be out of work for any

period of time. On January 20, 1979, Plaintiff's third day of absence during that week, company officials made their decision to terminate him. Tommy Cook, white, assistant personnel manager, planned to meet Plaintiff when he reported to work for the third shift on January 21, 1979, to notify him of his termination. Plaintiff was again absent from work on January 29, 1979. When Plaintiff came in on January 22, 1979, Cook met with him and notified him of his termination.

12. Plaintiff filed a charge of racial discrimination with the Charlotte, North Carolina, district office of the EEOC on January 15, 1979. Clyde Allen, Defendant's personnel manager, received notice of this charge by mail from the EEOC on January 23, 1979. Prior to this time, Plaintiff had also complained to management

about the promotions of Greg Smothers and Jimmy Gann to leadmen.

13. During Alfred Warren's employment, twenty-two employees were discharged for attendance and tardy violations. According to Defendant's practice, there was no specific number of absences or tardies which triggered discipline or termination and the company evaluated the individual circumstances surrounding the employee's absences and tardies and the reasons therefor. The company does not have excused or unexcused absences. Company regulations provide for a written warning for a first offense of excessive absenteeism, a three-day suspension for a second offense, and discharge upon the third offense.

14. Some employees discharged for attendance problems had fewer total absences

than Alfred Warren and other employees had more absences before being discharged. Plaintiff points to two white employees, Powell Whitten and Preston Wylie, Jr., who had more absences and tardies than he did before they were terminated.

15. Powell Whitten was employed in Defendant's construction department on January 3, 1978, and discharged for excessive absenteeism on December 1, 1978, after he had transferred into the production department. In the Defendant's construction department during early 1978, unlike the production department, attendance discipline was left to individual foremen and prior to a union campaign in mid-1978 it was not enforced as strongly as it was in the production department. In mid-1978, after a union began an organizing campaign

among Defendant's employees, Defendant began to centralize its discipline procedures for both the construction and production departments within its personnel department. After Whitten transferred into production, he received a written warning, suspension, and discharge for excessive absences consistent with Defendant's policy. Just prior to his termination he was out of work for several weeks with an on-the-job injury, and these days were included in his total of 78 days absent.

16. Preston Wylie, Jr., worked at Halstead from July 31, 1978, until May 29, 1980. During that period he had 43 absences and 23 tardys. His employment record shows three suspensions before discharge. However, Wylie was among striking employees who returned to work after a

strike, and the company adopted a policy for all strikers upon reinstatement establishing that their last level of discipline before the strike would be repeated if further discipline was applied after the strike. Prior to the strike Wylie received a suspension. He received another suspension after the strike instead of being discharged because of the policy applied to returning strikers. A third suspension for Wylie was an erroneous notation in the file because it had been given wrongfully by Wylie's supervisor and later countermanded by management.

Alvin Warren

17. Plaintiff, Alvin Warren was hired at Halstead on June 12, 1978, after graduating from high school and attending Winston-Salem State University for two

years. He had worked at summer jobs in construction for Duke Power Company I.L. Long Construction Company and at Schwartz Steel Company. He successfully completed his probationary period on September 12, 1978.

18. Alvin Warren was terminated on February 2, 1979, for wasting company time and for failure to cooperate with his foreman. Prior to his discharge, he received a written warning for absenteeism on December 11, 1978, a written warning for lack of cooperation on December 20, 1978, and a written warning and three-day suspension for wasting company time on January 11, 1979.

19. Clyde Allen gave Plaintiff the December 20, 1978, written warning for lack of cooperation. Allen told Plaintiff what the company considered lack of cooperation to be, including starting late, taking too

long on breaks, and failing to follow instructions of his foreman. Plaintiff's leadman, Greg Smothers, talked to Plaintiff a number of times about his wasting company time by spending too long on breaks and too much time in the bathroom. Smothers and Larry Sands, Plaintiff's foreman, kept notes of these instances. As a leadman, Smothers' responsibilities included keeping an employee's machine running while the employee was on break, so Smothers was particularly aware of the length of the breaks of employees on his shift. The notes spanned a period of time from December 4, 1978, to February 1, 1979, the day before Plaintiff's termination. Plaintiff continued to waste company time and the decision to terminate him was made by Bill McClain, the department manager, and Larry Sands, both white, and was approved by Clyde Allen.

20. Alvin Warren complained to management regarding the promotions to leadmen received by Greg Smothers and Jimmy Gann. He also complained to Clyde Allen that Greg Smothers had been yelling at him. Allen talked to Smothers, who told Allen that he did yell at Plaintiff and other employees in B-bay because of the noise level. On January 15, 1979, Plaintiff filed a charge of racial discrimination with the Charlotte, North Carolina, district office of the EEOC. On January 17, 1979, after his three-day suspension, Plaintiff met with Clyde Allen and Tommy Cook and told them that he did not feel blacks had any opportunities for advancement with the company.

21. Several white employees were terminated in 1978 and 1979 for reasons

similar to those for which Alvin Warren was discharged on February 2, 1979. Vernon Carter, ~~a white~~ employee, was discharged on January 20, 1979, for failure to cooperate with his foreman and for restricting production by failing to do his work. Roger Carter, a white employee, was terminated on June 29, 1978, for abusing break time. David Browning, a white employee in construction, was discharged on April 4, 1978, for lateness and not staying on the job. Robert Carter, a white employee, was terminated on October 24, 1978, for taking extended breaks.

22. On December 19, 1978, Alvin Warren and several other employees, including George Goolsby and Gary Calloway, both black, sought a meeting with John Terlinden, white, the plant manager, just before

their shift started at 11:00 p.m. They told their foreman, Larry Sands, that they wanted to discuss their concerns about racial discrimination in promotions with Terlinden. Neither Clyde Allen nor Terlinden were at the plant that night and the employees were instructed by Sands to return to work. These employees did not receive any warning notices for this incident, but Alfred Warren did receive the warning notice dated December 20, 1978, later during that shift for wasting company time.

23. Although Plaintiff testified that the company increased its harassment of him after December 19, 1978, other employees who sought a meeting with the plant manager on December 19, 1978, were not retaliated against because of their involvement. Gary Calloway was promoted to leadman in January 1979, one month after the attempted

meeting. George Goolsby also became a leadman in 1979, and subsequently received another promotion to foreman. Calloway and Goolsby, as indicated, are black.

24. Both Plaintiffs testified at length about alleged harassment by the Defendant after they had made complaints to management. They testified that Greg Smothers, Jimmy Gann, and Larry Sands would come up behind them and rub Plaintiffs' buttocks with their hands, laugh, and tell them they were not cooperating with management. They testified that they interpreted "cooperate with management" to mean that they should engage in homosexual activities. Plaintiffs did not bring to the attention of management during their employment any complaints about supervisors rubbing them or trying to get them to engage in homosexual activities. Gann and

Smothers testified that they never rubbed the Plaintiffs on the buttocks or anywhere else.

DISCUSSION

The Plaintiffs' claim in this case that the Defendant subjected them to unlawful discrimination and retaliation in violation of Title VII and Section 1981. The evidentiary flow of a disparate treatment case is now well established. Under Title VII and Section 1981, the elements of a prima facie case are the same. Gairola v. Virginia Dept. of General Services, 753 F. 2d 1281, 1285 (4th Cir. 1985); Lewis v. Central Piedmont Community College, 689 F. 2d 1207, 1209 n.3 (4th Cir. 1982), cert. denied, 460 U.S. 1040 (1983). To succeed on a disparate treatment theory in the absence of direct evidence of discrimination, the Plaintiffs must prove that Defendant treated non-minorities more

favorably than it did them with an intent to discriminate, although a discriminatory motive may be inferred in certain circumstances from the mere fact of differences in treatment. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). Absent direct evidence of discriminatory treatment, or of indirect evidence that but for the Plaintiffs' race or racial complaints they would not have been denied promotions or discharged, the guidelines set out by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), may be used "progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Dept. of Community Affairs v.Burdine, 450 U.S. 248, 255 n.8 (1981); see also Lovelace v. Sherwin-Williams Co., 681 F. 2d 230, 242 (4th Cir. 1982) (ADEA case). The initial burden is upon the

Plaintiff to establish a prima facie case of racial discrimination. That being accomplished, the employer is obligated to come forward with a legitimate non-discriminatory reason for its action. At this point, the Plaintiff is given a final opportunity to make out his case by establishing that the stated reason is pretextual. Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 252-53; McDonnell Douglas Corp. v. Green, 411 U.S. at 802-04. Despite the shifting of these intermediate burdens of production, the ultimate burden of persuasion remains on the Plaintiff throughout the proceedings. Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 253. Although McDonnell Douglas was a refusal to hire case, the principles it sets forth for the prima facie case have been applied in

discharge cases. See, e.g., Gairola v. Virginia Dept. of General Services, 753 F. 2d at 1286. They may be applied in discriminatory promotion cases as well. See, e. g., Wright v. National Archives and Records Service, 609 F. d 702, 714 (4th Cir. 1979).

The court is aware of the dangers in attempting to apply the McDonnell Douglas formula too rigidly, and that a prima facie case may be established by various means. Furnco Construction Corp. v. Waters, 438 U.S. 567, 575-76 (1978). The central focus in any disparate treatment case is whether the employer is treating some of its employees less favorably because of their race, color, religion, sex, or national origin. International Brotherhood of Teamsters v. United States, 431 U.S. at 335 n. 15. As noted, the McDonnell Douglas presumption need not be resorted to when the

claimant has carried his original production burden on the motivational issue by direct evidence or by indirect evidence establishing that but for the claimant's race he would not have been treated unfavorably. Lovelace v. Sherwin-Williams Co., 681 F. 2d at 242. The court does not believe, however, that such independent evidence has been presented in this case with the possible exception of the discharge claim of Alvin Warren, as discussed infra. Regardless, since the Defendant failed to persuade the court to dismiss the action for lack of a prima facie case, and offered evidence of the reasons for the Plaintiffs' adverse treatment, the proper focus for the court is whether the Defendant intentionally discriminated against the Plaintiffs. U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983).

CONCLUSIONS OF LAW

The Promotions Claims

The Plaintiffs assert that white employees with less seniority were promoted to the leadmen positions which they sought for discriminatory reasons. The court disagrees. The three instances cited by the Plaintiffs are not persuasive. Both Greg Smothers and Jimmy Gann were hired before the Plaintiffs and had more departmental seniority than they did. Their promotions were in accordance with company guidelines. There is no evidence that this policy was a pretext for discrimination. Indeed, Plaintiffs do not attack the policy, arguing only that their seniority entitled them to the promotions. Although Stephen Boles had approximately six weeks less seniority than the Plaintiffs, his promotion to leadman was only a temporary

one for two weeks. For the court to conclude that this brief isolated occurrence is evidence of racial discrimination against the Plaintiffs requires a quantum leap which the court is unwilling to make.

The Discharge Claim[2]

Alfred Warren

The evidence in this case establishes that Alfred Warren was dismissed because he failed to satisfy his employer's reasonable performance expectations by which all of his fellow employees were regularly judged. Plaintiff's attendance problems were well documented. Before the January 1979 absences which led to his discharge, he was given a written warning on December 8, 1978, because he had been absent nine days in a three-month period and late or absent from work twelve other part days; on December 29, 1978, he received a second

written warning and a three-day suspension for continued absences and lateness. He was absent from work on January 15, 16 and 20 before the company decided to discharge him. The company was unable to notify him of his discharge on January 21 because he was absent again.

Plaintiff has attempted to prove that he was treated differently from white em-

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2 Both parties introduced statistical data. Statistical evidence, however, is rarely determinative in individual disparate treatment cases. See, e. g., McDonnell Douglas Corp. v. Green, 411 U.S. at 805 n.19; Harper v. Trans World Airlines, 525 F. 2d 409, 412 (8th Cir. 1975); Opara v. Modern Manufacturing Co., 434 F. Supp. 1040, 1044-45 (D. Md. 1977). See generally B. Schlei & P. Grossman, Employment Discrimination Law 1315-16 (2d ed. 1983) and cases cited therein. Plaintiffs' expert witness, using the binomial model, testified about Defendant's total termination

(footnote 2 continued)
statistics for 1978 and 1979, which Plaintiffs contend show that the number of blacks discharged was significantly more than would be expected in the absence of racial discrimination in discharges. However, the information used by Plaintiffs' expert for her statistical calculations related to two sets of data, total terminations and non-total work force, which limit their probative value. Even so, a number of standard deviations greater than 3, while ruling out chance as the cause of disparity in the termination rates, serves only to shift the burden to the employer to come forward with a credible lawful explanation for the disparity. See Lilly v. Harris-Teeter Supermarket, 720 F. 2d 326, 336 n.20 (4th Cir. 1983), cert. denied, _____ U.S. _____, 104 S. Ct. 2154 (1984). Statistics are not sufficient to prove pretext in individual disparate treatment cases. See, e. g., Hudson v. IBM Corp., 620 F. 2d 351, 355 (2d Cir.), cert. denied, 449 U.S. 1066 (1980); King v. Yellow Freight System, Inc., 523 F. 2d 879, 882 (8th Cir. 1975); Terrell v. Feldstein Co., 468 F. 2d 910, 911 (5th Cir. 1972).

The Defendant offered statistical evidence tending to show that black representation in Defendant's work force increased significantly in 1978 and 1979. However, an employer cannot rely on evidence of hiring members of a protected group in proportion to their share in the population or work force as a defense to specific acts of discrimination. See Furnco Construction Corp. v. Waters, 438 U.S. at 579; Cross v. U.S. Postal Service, 639 F. 2d 409, 414 (8th Cir. 1981).

The court does not view either party's statistical evidence as persuasive in this case.

ployees in that white employees were not discharged until their attendance records had become worse than his. Plaintiff pointed to two white employees, Powell Whitten and Preston Wylie, Jr., who had more absences and tardies than he did before they were terminated. Although it is true that Powell Whitten had more total absences than Alfred Warren, the company offered a reasonable explanation for this fact. Whitten's initial employment was in the Defendant's construction department, where attendance discipline was handled differently from that in the production department and not enforced as strongly until a union campaign in mid-1978. This is not uncommon in industry, and whatever inferences may be made about more rigid disciplinary procedures during a union campaign in context of a National

Labor Relations Board proceeding, it is not evidence of racial discrimination in this case. Furthermore, a large block of Whitten's absences occurred consecutively because of an on-the-job injury, a different situation from the numerous separate instances of absences in the case of Alfred Warren, albeit for a shorter total period of time.

The more favorable treatment that Preston Wylie, Jr., apparently received was reasonably explained by the company in that Wylie, upon returning from a labor strike, was allowed to repeat his last level of discipline after the strike, a policy applied to all returning strikers, whether black or white. Another suspension for Wylie was attributable to his supervisor who was disciplined as a result, and thus cannot be considered evidence of racial discrimination. Plaintiff has not persuad-

ed the court that a discriminatory reason more likely than not motivated the Defendant or that Defendant's proffered explanation is unworthy of credence. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 256.

The fact that Plaintiff's discharge came on the heels of his EEOC charge is not by itself sufficient to sustain his retaliation claim. He must establish the causal nexus between the two events such that he would not have been terminated "but for" the EEOC filing. Ross v. Communications Satellite Corp., No. 84-1355, slip op. at 24-25 (4th Cir. April 12, 1985); see also EEOC v. Federal Reserve Bank, 698 F. 2d 633, 669 (4th Cir. 1983), rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank, _____ U.S. _____ , 104 S. Ct. 2794 (1984); Kralowec v. Prince George's County, 503 F. Supp. 985, 1008 (D. Md.

1980), aff'd mem., 679 F. 2d 883 (4th Cir.), cert. denied, 459 U.S. 872 (1982). An employees discharge based on attendance, if properly established, is sufficient to rebut an inference of discrimination and shift the burden of production to the Plaintiff in a disparate treatment case. See, e. g., EEOC v. Federal Reserve Bank, 698 F. 2d at 665-69; Wright v. Southwest Bank, 648 F. 2d 266, 267 (5th Cir. 1981); Leftwich v. U.S. Steel Corp., 470 F. Supp. 758, 766 (W.D. Pa. 1979). Defendant's witnesses testified that they had no notice of the Plaintiff's January 15, 1979 charge when they made the decision to terminate him on January 20, 1979.[3] However, even if Plaintiff's supervisors had knowledge of the charge at the time, any inference that it was a consideration in their decision would be entirely speculative in view of the strong objective evidence of continuing

absenteeism supporting termination. The company was even delayed in notifying the Plaintiff, once a decision to terminate Plaintiff had been made, because of his continued absence.

Alvin Warren

Plaintiff Alvin Warren was terminated on February 2, 1979, for wasting company time and for failure to cooperate with his foreman. Prior to his discharge he had received a written warning for lack of cooperation on December 20, 1978, and a written warning and three-day suspension for wasting company time on January 11, 1979. In addition, he had received a written warning for absenteeism on December 11, 1978. Because of the subjective nature of the alleged infractions, the documentary

proof introduced by the Defendant does not establish infractions of company rules with the same clarity as the records of Alfred Warren's absenteeism. In addition, the written notations made by Alvin Warren's supervisors as to the instances of wasting time, while not unprecedented, were not the type of records routinely kept on all employees in B-bay of the production department. Therefore, the court must consider carefully the possibility that Defendant singled out Alvin Warren and proceeded to "build a record" to justify his discharge. Furthermore, there is no question but that by February 2 the

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[3] If the employer does not know of the protected activity a causal connection to the adverse action cannot be established. Ross v. Communications Satellite Corp., slip op. at 24 n.9.

Defendant had knowledge of the January 15, EEOC charges filed by both Plaintiffs. Alvin Warren's complaints to management about promotions and his treatment by supervisors are also uncontradicted.

Plaintiff's competence and job performance may be established on the judgment of his supervisors "in the absence of any evidence drawing its essential integrity into question." Wright v. National Archives and Records Service, 609 F. 2d at 714; accord Smith v. Flax, 618 F. 2d 1062, 1067 (4th Cir. 1980). In assessing the reasons offered by the Defendant for Plaintiff's discharge, the court's focus is not on Defendant's business judgment or the fairness of its actions, but on its motivation. The factual inquiry is on which party's explanation of the employer's motivation

the court believes. The Plaintiff must persuade the court that a discriminatory reason more likely than not motivated the Defendant, or that the Defendant's proffered explanation is unworthy of credence. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 256.

The only evidence of Plaintiff's satisfactory performance of his duties in this case came almost exclusively from his own testimony. However, the Plaintiff's evaluation of his own performance is not relevant. Smith v. Flax, 618 F. 2d at 1067. While his EEOC charge was filed shortly before his discharge, neither Title VII nor 42 U.S.C. Section 1981 requires an employer to immunize protected class members who have filed charges of discrimination from discharge despite their poor performance. See Ross v. Communications

Satellite Corp., slip op. at 26; EEOC v. Federal Reserve Bank, 698 F. 2d at 668-69. To hold otherwise would allow an employee within a protected group to insulate himself from discipline by the mere act of complaining about alleged discrimination. EEOC v. Federal Reserve Bank, 698 F. 2d at 668-69; see also Ross v. Communications Satellite Corp., slip op. at 26.

Although Alvin Warren possibly established a prima facie case of discrimination through a combination of the timing of his EEOC charge and his discharge approximately two weeks later, together with the subjective nature of many of his alleged job deficiencies, the court cannot base a finding of racial discrimination or retaliation on mere speculation. In an attempt to establish that Defendant's proffered reasons for his discharge were

pretextual, Plaintiff testified that white employees were not terminated for wasting time, that he was never told what failure to cooperate meant, and that he was constantly harassed by management.

Defendant offered evidence of several white employees who were terminated in 1978 and 1979 for reasons similar to those for which Alvin Warren was discharged. Four white employees were terminated in the months just preceding Plaintiff's termination for failure to cooperate and not staying on the job. Defendant also points out that other black employees who accompanied Alvin Warren on the December 19, 1978, attempt to meet with the plant manager concerning racial discrimination in promotions were later themselves promoted, thus creating a strong inference that the company did not discriminate against

employees in retaliation for voicing complaints. Defendant's personnel manager, Clyde Allen, explained to Plaintiff on at least one occasion, the time of the December 20, 1978, warning, what the company considered lack of cooperation. Plaintiff's leadman, Greg Smothers, also talked to him a number of times about it.

Plaintiff has not established a causal nexus between his EEOC charge and his subsequent discharge such that he would not have been terminated "but for" the EEOC filing. Ross v. Communications Satellite Corp., slip op. at 24-25. Plaintiff had received written warnings for his conduct prior to filing his charge and the court is persuaded that his termination was for continuing the conduct for which he had been previously warned.

Both Plaintiffs testified that their supervisors would come up behind them and

rub Plaintiffs' buttocks with their hands, laugh, and tell them they were not cooperating with management. They testified that they interpreted "cooperate with management" to mean that they should engage in homosexual activities. The court does not believe that Alvin Warren's discharge for failure to cooperate and for wasting time was in any way related to the alleged instances of fondling by his supervisors or his failure to submit to homosexual advances. Virtually the only evidence that such instances ever occurred was the testimony of the Plaintiffs themselves. The court has carefully considered the Plaintiffs' testimony in this regard, both on direct and cross-examination, and does not find it credible. The same may be said for much of the Plaintiffs' other testimony. As witnesses, Plaintiffs were

equivocal, inconsistent, and often contradictory. Much of their testimony must be discounted by the court, making due allowances for their age, inexperience, and lack of familiarity with the role in which they found themselves on the witness stand.

For the foregoing reasons, it is concluded that:

1. The court has jurisdiction over the parties and over the subject matter of this action.

2. Defendant did not discriminate against the Plaintiffs because of their race by failing to promote them in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq.

3. Defendant did not terminate Plaintiffs in retaliation for their filing of administrative charges of racial discrimination with the Equal Employment Opportunity Commission or for complaining

to management about racial discrimination in violation of Title VII of the Civil Rights Acts of 1964, 42 U.S.C. Section 2000e et seq.

4. Defendant did not terminate Alvin Warren on account of his race in violation of 42 U.S.C. Section 1981.

5. Defendant did not terminate Alvin Warren for filing administrative charges of racial discrimination with the Equal Employment Opportunity Commission or for complaining to management about racial discrimination in violation of 42 U.S.C. Section 1981.

The court will enter a judgment simultaneously herewith dismissing this action in accordance with this memorandum opinion.

s/Frank W. Bullock, Jr.
United States District Judge

April 26, 1985.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

ALVIN WARREN and ALFRED WARREN, Plaintiffs,	)	
v.	)	CIVIL NO. C-82-153-WS
HALSTEAD INDUSTRIES, INC., Defendant.	)	

J U D G M E N T

For the reasons set forth in a memorandum opinion filed contemporaneously herewith, the court has determined that judgment should be entered for Defendant Halstead Industries, Inc., on all remaining claims against it;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiffs have

and recover nothing from Defendant and that this action be DISMISSED with prejudice, each party bearing its own costs.

s/ Frank W. Bullock, Jr.
United States District Judge

April 26, 1985

No. 87-1810

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ALVIN WARREN and ALFRED WARREN,

Petitioners,

v.

HALSTEAD INDUSTRIES, INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. IN LIGHT OF THE SUBSTANTIAL EVIDENCE SUPPORTING THE EMPLOYER'S NONDISCRIMINATORY EMPLOYMENT DECISION, WAS THE TRIAL COURT COMPELLED TO REJECT THAT EVIDENCE IN FAVOR OF PETITIONERS' STATISTICAL EVIDENCE?

II. DOES THE BURDEN OF PROOF SHIFT TO THE EMPLOYER IN AN INDIVIDUAL DISPARATE TREATMENT CASE FILED UNDER TITLE VII AND SECTION 1981?

III. DOES RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE MANDATE REJECTING ORAL TESTIMONY WHICH CLARIFIES INCOMPLETE DOCUMENTARY EVIDENCE?

PARTIES AND LIST OF AFFILIATED CORPORATIONS

The Respondent is properly identified in the Petition. There are no other affiliated corporations with an interest in this action.

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No. 87-1810

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OCTOBER TERM, 1988

ALVIN WARREN and ALFRED WARREN,

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v.

HALSTEAD INDUSTRIES, INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Halstead Industries, Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Fourth

Circuit's en banc opinion in this case. That opinion is reported at 835 F.2d 535 (4th Cir. 1988), and is fully set out in the Appendix to the Petition at pages 70a-73a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

The Petition properly identifies each of the statutes involved in this case.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioners filed their action in federal district court alleging that Respondent discriminated against them in violation of the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. (hereinafter

"Title VII") and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (hereinafter "Section 1981"). Specifically, Petitioners alleged that they were denied promotions and discharged because of their race. They also claimed that they were retaliated against for filing administrative charges of discrimination with the Equal Employment Opportunity Commission and for complaining to management about racial discrimination. After a five-day trial, the district court entered judgment in favor of Respondent, dismissing the case. See, Petition, pp. 74a-121a. A three-judge panel of the Fourth Circuit Court of Appeals in part reversed the district court. See, Petition, pp. 1a-69a. After a timely petition for rehearing was granted, the Fourth Circuit Court of Appeals, sitting en banc,

reversed the decision of the three-judge panel and affirmed the findings and conclusions of the district court in all respects. See, Petition, pp. 70a-73a.

B. Statement of Facts.

The trial evidence fully supported the district court's findings of nondiscrimination and nonretaliation. Regarding the discharge claim of Petitioner Alvin Warren (hereinafter "Alvin"), the evidence established that Alvin was discharged for poor performance. Problems associated with Alvin's attendance, tardiness, and wasting time were documented and discussed with him during his probationary period. After Alvin's probationary period, he received progressive discipline for: (a) spending too much time away from his job by overstaying break and meal periods; (b) wasting

time; (c) failing to cooperate with supervisors; and (d) inadequate production. When Alvin failed to show improvement in these areas after proper disciplinary measures were taken, he was discharged. The evidence at trial showed that at least six white employees were terminated by Respondent for similar reasons.

The discharge of Petitioner Alfred Warren (hereinafter "Alfred") for poor attendance was likewise supported by the evidence. The testimony showed that Alfred's attendance problems were well documented and that his absenteeism and tardiness were excessive. Alfred's attendance problems began during his probationary period with Respondent and continued until he was discharged. Prior to his discharge, Alfred received

the normal progressive discipline, but his attendance did not improve. As a result, Alfred was discharged. It is important to note that the trial record showed that twenty-two other employees were similarly discharged by Respondent for attendance problems during Alfred's employment.

The decision of the lower court concerning Petitioners' promotion claim is likewise supported by the record evidence. Respondent promotes employees to leadmen positions on the basis of seniority. However, temporary upgrades to substitute for vacationing supervisors or leadmen are <u>not</u> based on seniority. Respondent's officials testified that Stephen Boles, an employee with less seniority than Petitioners, was temporarily upgraded for two weeks to a lead-

man's position as a substitute leadman. At the end of this temporary upgrade, he returned to his bench operator job, and he was not permanently promoted to a leadman position until after Petitioners' employment ended. While Boles' written service record noted the beginning of the temporary upgrade, it failed to note its termination when he returned to his bench operator position. The testimony of Respondent's officials ciarified this omission in Boles' service record. Thus, the evidence at trial clearly established that no white employee with less seniority than Petitioners was promoted to a leadman position.

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

A. The Trial Court's Evaluation of the Statistical Evidence Complied With This Court's Prior Decisions and the Decisions of Other Circuits.

The first argument raised by Petitioners concerns the use of statistics in resolving individual disparate treatment claims of employment discrimination. Petitioners' argument is two-fold: (1) that there is a split in the circuits concerning whether statistical evidence alone mandates a finding of discrimination, and (2) this Court's prior decisions hold that evidence of gross statistical disparities mandate a finding of discrimination. Contrary to Petitioners' position, no circuit has embraced Petitioners' argument that sta-

tistics supersede all other evidence in an individual disparate treatment case. Likewise, the decisions of this Court support the trial court's consideration of the statistics involved in this case.

First, it is significant that the trial court did not reject the statistical evidence introduced by either party. After evaluating the statistical evidence presented, the trial court found that such evidence was not persuasive "in this case." See, Petition, p. 105a. By evaluating all the evidence, including the statistical evidence, the trial court adhered to this Court's guidance provided in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973), and International Bhd. of Teamsters v. United States, 431 U.S. 324, 97 S. Ct.

1843 (1977). As noted by this Court in Teamsters:

> We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.

431 U. S. at 340; 97 S. Ct. at 1856-57. This Court's decisions clearly do not mandate that statistical evidence be given controlling weight in an individual disparate treatment case.

Second, there is no split in the circuits concerning the use of statistics in an individual disparate treatment case. Each case cited in the Petition holds that statistics are relevant evidence for a trial court to consider in an employment discrimination action. However, none of the cases cited by Petitioners hold that a trial court must

ignore all other evidence presented in favor of the statistical evidence of one of the parties. Rather, these cases fully support this Court's mandate that a trial court consider all the evidence in resolving disparate treatment claims. See, Diaz v. American Tel. & Tel., 752 F.2d 1356, 1363 (9th Cir. 1985) (statistical evidence relevant to creating inference of discriminatory intent); Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1342 (9th Cir. 1981), cert. denied, 459 U. S. 823, 103 S. Ct. 53 (1982) (statistical evidence helpful in an individual employment discrimination case); Riordan v. Kempiners, 831 F.2d 690, 698 (7th Cir. 1987) (statistics constitute some evidence of discrimination in a disparate treatment case).

The cases cited by Petitioners are in full accord with this Court's decision in McDonnell Douglas. In that case, this Court noted that a plaintiff may utilize numerous types of evidence in an effort to show that the legitimate nondiscriminatory reason articulated by an employer is pretextual. The Court noted that statistical evidence is but one form of evidence that the employee might utilize:

> [S]tatistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks.

411 U. S. at 805; 93 S. Ct. at 1825 (emphasis added). However, this Court did not hold that statistics override all other forms of evidence and neither do the cases cited in the Petition.

Thus, there is no split in the circuits concerning the use of statistics in an individual disparate treatment case. More importantly, they do not hold that statistical evidence overrides all other evidence.

B. The Trial Court's Allocation of the Burden of Proof in This Individual Disparate Treatment Case Is Not in Conflict With This Court's Prior Decisions or the Decisions of Other Circuits.

The Petition's second argument is that there is a split in the circuits concerning the allocation of the burden of proof in a Title VII individual disparate treatment case. Petitioners cite cases from the Seventh, Eighth, Ninth, and D.C. Circuits which address the burden of proof in a mixed motive case.

However, this case is not a mixed motive case. Neither the trial court nor the Court of Appeals found a statutory violation which is a necessary predicate for any mixed motive analysis. Thus, those cases are inapposite.

The cases cited by Petitioners all stand for the proposition that the burden of proof may shift to the employer, but only at the remedial stage of a Title VII disparate treatment case. Once a court has found a violation of a nondiscrimination statute, an employer may still escape liability if it can show that notwithstanding the discrimination, the same employment action would have occurred. It is only at this remedial stage that the burden of proof shifts to the employer. As articulately

explained by the Eighth Circuit Court of Appeals:

> [O]nce the plaintiff has established a violation of Title VII by proving that an unlawful motive played some part in the employment decision or decisional process, the plaintiff is entitled to some relief . . . . However, even after a finding of unlawful discrimination is made, the defendant is allowed a further defense in order to limit the relief. The defendant may avoid an award of reinstatement or promotion and back pay if it can prove by a preponderance of the evidence that the plaintiff would not have been hired or promoted even in the absence of the proven discrimination.

Bibbs v. Block, 778 F.2d 1318, 1323-24 (8th Cir. 1985) (footnote omitted) (emphasis added).

The allocation of the burden of proof at the remedial stage of a Title VII case--after a finding of discrimination--is clearly different from the allo-

cation of the burden of proof necessary for resolving the threshold question of discrimination. The burden of proof on the initial issue of discrimination is clearly controlled by this Court's decision in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981). In that case, this Court clarified that the burden of proof remains at all times on the plaintiff to prove discrimination. The trial court here correctly applied Burdine. The only burden that shifts to the employer is the burden of articulating a legitimate nondiscriminatory reason for the challenged employment action. Id. at 252-53; 101 S. Ct. at 1093 (citations omitted). As noted by Justice Scalia while sitting on the Court of Appeals for the District of Columbia Circuit,

the holdings in those cases shifting the burden of proof to the employer at the remedial stage of a Title VII case do not apply to the allocation of the burden of proof as established in Burdine. Toney v. Block, 705 F.2d 1364, 1368 (D.C. Cir. 1983). Since the cases cited by Petitioners are inapposite, and since the allocation of the burden of proof in an individual disparate treatment case has been conclusively established by this Court, the Petition should be denied.

C. The Trial Court Did Not Misapply Rule 52(a) of the Federal Rules of Civil Procedure in Evaluating the Oral and Documentary Evidence at Trial.

Petitioners' final argument concerns the trial court's factual finding

that Stephen Boles' temporary two-week upgrade to leadman did not constitute discrimination against Petitioners. The district court noted that while Boles had less seniority than Petitioners, no discrimination was involved since the upgrade was temporary (two weeks) and in accordance with Respondent's established policy that seniority does not control such temporary upgrades.

Petitioners contend that this factual finding is contrary to Rule 52(a) and prior decisions of this Court since, in Petitioners' view, the oral testimony concerning the temporary nature of the upgrade allegedly conflicted with Boles' employee service record. Petitioners necessarily contend that the documentary evidence (Boles' service record) is the only evidence the trial court was per-

mitted to consider in evaluating the temporary or permanent nature of Boles' upgrade.

Rule 52(a) and prior decisions of this Court do not support Petitioners' contention. In clarifying the parameters of judicial review under Rule 52(a), this Court noted that it was the proper role of appellate courts to accept factual findings of a trial court where such findings are supported by the trial record viewed in its entirety:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511 (1985) (emphasis added). At no point, either in Anderson or in United States v. United States Gypsum Co., 333 U.S. 364, 396, 68 S. Ct. 525, 542 (1948), has this Court directed trial courts to favor documentary evidence over oral testimony. To the contrary, it has always been this Court's directive for trial courts to base factual findings upon the trial record as a whole.

In this case, the trial court properly followed the guidelines set out in Rule 52(a) and clarified in Anderson. The court noted the possible discrepancy between the oral testimony and the documentary evidence and reconciled it. See, Petition, pp. 81a-83a. In doing

so, the trial court noted that Boles' service record was incomplete and that the oral testimony adequately and credibly clarified the omission in that document. In reaching its factual finding that Boles' upgrade was only temporary, the trial court viewed all the evidence presented by the parties; it viewed the trial record in its entirety. This is precisely what this Court's decision in Anderson and Rule 52(a) require. Thus, no basis for granting the Petition is presented by this argument.

CONCLUSION

Based on the above argument and authority, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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NO. 87-1810

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALVIN WARREN and ALFRED WARREN,

Petitioners,

v.

HALSTEAD INDUSTRIES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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No. 87-1810

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

ALVIN WARREN and ALFRED WARREN,

Petitioners,

vs.

HALSTEAD INDUSTRIES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

I.
THE EFFECT OF EVIDENCE OF A GROSS STATISTICAL DISPARITY ON PROVING PRETEXT

Respondent misapprehends petitioner's argument concerning the issue of statistical proof in an employment discrimination case. The petitioners do not contend that

statistics alone can prove discrimination, or that statistics override all other forms of evidence. To the extent that the respondent characterizes the petitioners' position in this light, the respondent misapprehends petitioners' argument. The District Court determined that the petitioners' evidence was sufficient to make out a prima facie showing of retaliatory discharge, and that the respondent had articulated a legitimate nondiscriminatory reason for discharging the petitioners from their employment. The District Court then reached the issue of whether the petitioners had proved that the reasons articulated by their employer for discharging them were pretextual.

In addition to other evidence proving pretext, the petitioners presented evidence of a gross statistical disparity between the discharge rates of black

vis.a.vis white employees. Respondent erroneously argues that the District Court did not reject the statistical evidence, but viewed it in light of all other evidence. To the contrary, the District Court made it clear that it did not give the evidence of a gross statistical disparity any weight. It held as a matter of law that: "Statistics are not sufficient to prove pretext in individual disparate treatment cases." (Appendix to Petition, pp. 104a-105a). This legal holding was affirmed by the Fourth Circuit sitting en banc. It is this legal ruling which is directly in conflict with opinions of other circuit courts.

The Ninth Circuit in Diaz v. American Telephone & Telegraph, 752 F. 2d 1356 (9th Cir. 1985) concluded that statistical evidence can be sufficient in an individual employment discrimination case to

prove pretext. The Court noted that statistical evidence can establish discriminatory intent with respect to the individual employment decision at issue. Other circuit courts have also expressly held that statistics may prove pretext in an individual employment discrimination case. Riordan v. Kempiners, 831 F. 2d 690 (7th Cir. 1987); Powers v. Dole, 782 F. 2d 689 (7th Cir. 1986); Craik v. Minnesota State University Board, 731 F. 2d 465 (8th Cir. 1984). The Third Circuit in an age discrimination case, in Blum v. Witco Chemical Corp., 829 F. 2d 367 (3rd Cir. 1987), recognized that statistical proof was an appropriate method of proving discriminatory intent in an individual case.

Not only do these decisions of the Third, Seventh, Eighth, and Ninth Circuits stand in direct conflict with the holding

of the Fourth Circuit in the instant case, but these decisions are contrary to the decisions of the Second and Fifth Circuits. See Hudson v. IBM Corp., 620 F. 2d 351, 355 (2d Cir.), cert. denied, 449 U.S. 1066 (1980); Terrell v. Feldstein Co., 468 F. 2d 910, 911 (5th Cir. 1972). By failing to come to grips with the fact that the petitioners had already been found by the District Court to have proven a prima facie case of discrimination in discharge, and that the District Court had expressly held that statistics could never prove pretext in an individual discrimination case, the respondent failed to recognize the conflict in the circuits. Certiorari should be granted to resolve this conflict among the circuits concerning an important issue in employment discrimination litigation.

The respondent incorrectly contends

that the decision of the Fourth Circuit in the instant case is consistent with this Court's ruling in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973). This Court specifically noted in McDonnell Douglas Corp., supra. that once the court addresses the issue of pretext, statistics may be helpful to show whether the employer's action conformed to a general pattern of discrimination against blacks. Id. at 805. The respondent completely ignores this Court's decisions in Castaneda v. Partida, 430 U.S. 482, 51 L. Ed. 2d 498, 97 S. Ct. 1272 (1977) and in Hazelwood School District v. United States, 433 U.S. 299, 53 L. Ed. 2d 768, 97 S. Ct. 2736 (1977). In those cases, this Court concluded that when the number of standard deviations are greater than two or three, one must conclude that racial or other class

related factors entered into the decision. In the present case, the number of standard deviations, 9.08 and 8.18 respectively, are so gross that an inference of discriminatory intent has been shown based on the standard enunciated in Castaneda, supra. and Hazelwood School District, supra. The respondent fails to make any attempt to reconcile the Fourth Circuit decision with these decisions. At trial, the respondent failed to produce any evidence to explain the gross statistical disparity or to offer any credible explanation for the wholesale and massive firings of black employees at Halstead Industries.

II.

SHIFTING THE BURDEN OF PERSUASION IN A MIXED-MOTIVE CASE OF RETALIATORY DISCHARGE

Respondent ignores the conflict among the circuits concerning the legal

standards of proof in mixed-motive cases. Respondent incorrectly contends that the instant case involving retaliatory discharge is not a mixed-motive case. The Fourth Circuit panel in Warren v. Halstead Industries, 802 F. 2d 746 (4th Cir. 1986) made it clear that the evidence showed that retaliation played a part in the discharge of both petitioners.

With respect to Alfred Warren, the Fourth Circuit noted various circumstances suggesting that the reason given for his termination was a pretext. First, the Court highlighted the close proximity between the filing of his EEOC charge on January 15, 1979 and the decision to terminate him on January 20, 1979. Second, the Court noted that the Company violated its own stated policies by counting absences against him when he was out of work due to a work-related injury

or illness. If these absences had not been counted, Alfred Warren's attendance record would have been satisfactory. As the Fourth Circuit noted in Footnote 7:

> Halstead's company manual states that 'an employee who sustains an accident on the job which causes him to lose work, as confirmed by a physician, will not be penalized for his absences, provided they do not exceed sixty (60) calendar days.' Nevertheless, Alfred was charged as absent for ten days even though he was receiving Workmen's Compensation for a work-related injury. Again, he was listed eight hours absent on January 6, 1979 when he claims to have begun the shift, had a work injury with a hammer, and been sent home. Also, Alfred claims that on numerous days he was marked as "absent" or "left early" because he suffered work-related problems (specifically, bronchial congestion from breathing cooper fumes) and was sent home with the company's permission.
> (Appendix to Petition, pp. 35a-36a)

Third, the Court pointed out that Alfred Warren's medical excuses were arbitrarily turned down by his employer

without ever telling him. The personnel manager Clyde Allen admitted that he made a "bad assumption" that the doctor who gave Alfred Warren a medical excuse for fatigue syndrome would give anybody a medical excuse. (Appendix to Petition, p. 34a). Finally, the Court noted that there were no objective standards as to what constituted excessive absenteeism. The Court concluded that: "Such a loose, subjective absenteeism policy may indeed be susceptible to manipulation for a discriminatory reason."

With respect to Alvin Warren, the Fourth Circuit also highlighted evidence showing that retaliation played a role in his discharge from employment. First, the Court noted that the employer subjected him to exceptional scrutiny by having notations made on note cards about him and that these kind of note cards were not

kept on white employees. Second, there was the close proximity between Alvin Warren filing his EEOC charge on January 15, 1979 and his discharge on February 2, 1979. Third, the reason given for his discharge was completely subjective, and only served a pretextual purpose. As the Fourth Circuit panel stressed:

> As to the content of the "lack of cooperation" with which Alvin was charged, the testimony shows that the term was hopelessly elastic and subjective and only served a pretextual -- rather than a legitimate -- company function.

Personnel manager Allen described "lack of cooperation" as follows: "It is just a discretionary concept."

Finally, the Court emphasized the gross statistical disparity as showing pretext. Therefore, respondent's contention that the Fourth Circuit did not recognize that the discharges of the

petitioners was based on a mixed-motive is unfounded. The Fourth Circuit made it clear that it had enunciated a higher standard of proof compared to other circuits:

> Even if discriminatory animus or retaliation is "in part" a reason for the adverse employer actions, in this circuit a more stringent standard applies and requires that the plaintiff show that he would not have been discharged "but for" the filing of the charge on the protected activity. Ross v. Communications Satellite Corp., 759 F. 2d 355, 365-66 (4th Cir. 1985).

The Fourth Circuit's "but for" standard in a mixed-motive case under Title VII of the 1964 Civil Rights Act is in conflict with decisions of the Seventh, Eighth, Ninth, and D.C. circuits. These circuits have held that there is a violation of Title VII in a mixed-motive case, if an unlawful motive played some part in the employment decision. Once

this showing has been made by the plaintiff, these circuits have concluded that the burden of persuasion shifts to the employer to prove that it would have made the same decision. See Bibbs v. Block, 778 F. 2d 1318 (8th Cir. 1985); League of United Latin American Citizens v. City of Salinas Fire Department, 654 F. 2d 557 (9th Cir. 1981); Cavidale v. State of Wisconsin, Department of Health & Social Services, 744 F. 2d 1289 (7th Cir. 1984); and Toney v. Block, 705 F. 2d 1364 (D.C. Cir. 1983).

Respondent fails to address the decisions of this Court concerning mixed-motive cases and the shifting burden of proof. In Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 275, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977), this Court set forth the test as to when the burden of persuasion shifts to

the defendant in a First Amendment retaliatory discharge case:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' - or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

In Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), this Court also held that when the plaintiff proved that the Village was motivated in part by a racially discriminatory purpose, the burden of persuasion then shifted to the Village to prove that it would have made the same decision even had the impermissible purpose not been

considered.

In the instant case under the 'some part', or 'a factor', or 'a substantial factor' test, the burden of persuasion would have shifted to Halstead Industries to prove that the petitioners would have been terminated from their employment anyway, without consideration of the impermissible factor. Certiorari should be granted to resolve a major and recurring issue of disagreement among the circuits. Whether a litigant prevails in a mixed-motive retaliatory discharge case should not depend on the circuit in which he resides. Uniformity and stability in the law on such an important issue are imperative.

Finally, the respondent erroneously argues that the Court clarified the burden of proof allocations in Texas Dept. of Community Affairs v. Burdine, 450

U.S. 248, 67 L. Ed 2d 207, 101 S. Ct. 1089 (1981), and that this case controls the issue raised here. Respondent fails to recognize that Burdine, supra. was not a retaliatory discharge case where a mixed-motive was involved. This Court has not decided the standard for allocating the burden of persuasion in a mixed-motive case pursuant to Title VII. The cases previously cited by the petitioners on this issue were decided after Burdine. Although this Court's decision in Mt. Healthy City School District Board of Education, supra. and Arlington Heights, supra. appear to be supportive of petitioners' position, those opinions addressed shifting the burden of persuasion in mixed-motive cases under constitutional provisions. This issue has yet to be decided by this Court with respect to Title VII, and certiorari

should be granted to resolve the stark conflict among the circuit courts.

III.

STANDARD OF APPELLATE REVIEW WHEN TESTIMONY IS DIRECTLY CONTRADICTED BY DOCUMENTARY EVIDENCE

Respondent contends that although there was a discrepancy between the contemporaneous employment record of a white employee, Stephen Boles and the oral testimony, the District Court's fact-finding process was permissible because it reconciled this discrepancy. The problem with this argument is self-evident. First, the Fourth Circuit panel noted that there was a direct contradiction in the instant case between respondent's contemporaneous documentary records and the testimony of its witnesses in this regard. The Court pointed out that the record clearly showed that Boles was promoted to a temporary leadman for

thirteen weeks and not two weeks, that he was not a temporary substitute for two weeks because he never returned to his previous job as a bench operator, that his pay never reverted to what he was making before he was made a temporary leadman, and that after the thirteen weeks he was promoted to a regular leadman. Although Halstead's personnel manager, Clyde Allen, characterized the company record as a mistake, he failed to produce for the Court the paycard or payroll register which he contended would show whether the contemporaneous employment record was correct or not. This led the Fourth Circuit panel to conclude:

> It is not the appropriate role for a court to second-guess the evidence before it and rely on one party's contention that it 'could have' brought the evidence supporting its story to the fact-finder. On their face, the company records corroborate plaintiffs' claim that a white employee

> with six-weeks less seniority was promoted over them . . . We have no choice but to find the district court's Finding of Fact #8 and its conclusion of law based on that finding to be clearly erroneous. (Appendix to Petition, p. 63a).

Second, not only do the documentary records contradict respondent's oral testimony, but the testimony positing that Boles worked as a temporary leadman for two weeks and then reverted to his previous job was based solely on speculation and surmise. On cross-examination, Allen admitted that his speculation was uncertain at best:

> ALLEN: On the entry of 12-18-78 it shows a temporary leadman. As best I remember there was another entry that should have gone in after that taking him back to bench operator after one week, I believe that was regarding a temporary one week upgrade.
> Q. You're not sure of that?
> A. No, I'm not.
> (Vol. V, 4th Cir. Jt. App., p. 103)

Respondent mischaracterizes petitioners' position by contending that

petitioners have argued that documentary evidence should be favored over oral testimony. Petitioners have not made such an argument. What petitioners do contend is that the factfinding process employed by the District Court with respect to this issue was contrary to this Court's decision in United States v. United States Gypsum Company, 333 U.S. 364, 92 L. Ed. 746, 68 S. Ct. 525 (1948). Although the trial court has the opportunity to assess the credibility of witnesses, when such testimony is in conflict with contemporaneous documents which were kept by the respondent in the usual course of business, such testimony is entitled to little weight. Gypsum, supra. at 396. The factfinding process of the District Court was inconsistent with this Court's previous ruling in Gypsum and with Rule 52(a) of the Federal Rules of Civil

Procedure.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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